

No. 15005

United States
Court of Appeals
For the Ninth Circuit

THE FLINTKOTE COMPANY, a Corporation,
Appellant,

vs.

ELMER LYSFJORD and WALTER R. WAL-
DRON, Doing Business as Aabeta Co.,
Appellees.

Transcript of Record
In Three Volumes

Volume III
(Pages 853 to 1270)

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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(Testimony of Robert Eugene Ragland.)

Q. Well, I might suggest a couple of other things. And I realize you can't remember everything. The question, have you stated everything is rather an unfair question when you are on the witness stand, whether your counsel asks it or I do.

But isn't it true at that time, after Lysfjord had told you of his sales ability in the immediate area here, didn't you or Mr. Baymiller suggest that there would be a subsequent meeting held at which Mr. Thompson would attend, and didn't you suggest that Mr. Lysfjord bring along something to prove his sales ability in the form of actual contracts or such?

A. Did I say that?

Q. Yes. A. No, sir. [857]

Q. Did Mr. Baymiller suggest that?

A. No, sir. If that was said, Mr. Lysfjord suggested it himself.

Q. Well, do you recall Mr. Lysfjord suggesting that he could prove his statements by signed contracts? A. No, sir.

Q. You do recall, though, that at a subsequent meeting, the next succeeding meeting, he did bring a portfolio of signed contracts?

A. I recall that.

Q. Now you stated on direct that Mr. Baymiller at this meeting stated after Lysfjord had told him about Hayden-Lee, Jackson Bros., or whatever other contractors he mentioned, your direct testimony was that Mr. Baymiller said, "Yes, but you can't continue to sell them if we give you the line." Is that the substance of what you said?

(Testimony of Robert Eugene Ragland.)

A. That is right.

Q. "You can't operate in Los Angeles, that is definite"?

A. That is very definite.

Q. Well, when you left this Manhattan Club meeting, this luncheon meeting, was there any understanding that you would arrange a future meeting?

A. It was a general understanding that it was nothing definite as to a date or a place. [858]

Q. But there was an understanding, was there not, Mr. Ragland, that both you and Mr. Baymiller still felt it was a good idea to have Lysfjord and Waldron on your team, didn't you?

You said yes? You nodded your head.

A. I don't like the use of that word "understanding" because I have been criticized for using it.

Q. It was the feeling that you would have a future meeting?

A. That was the discussion between Mr. Baymiller and myself, yes, sir.

Q. I have a right to ask you how you felt, Mr. Ragland.

A. I see.

Q. At that time did you still feel that you wanted Waldron and Lysfjord on the Flintkote team?

A. I continued to feel that way, yes, sir.

Q. And have you any reason to believe that Mr. Baymiller at that time felt the same way, after talking with Lysfjord?

A. Yes, sir.

Q. Then I take it you did have—when you got

(Testimony of Robert Eugene Ragland.)

back to the office did you talk with Mr. Thompson?

A. I don't recall if he was in or not. If he was we did briefly.

Q. But whether it was when you first got back or otherwise, [859] you did talk to Mr. Thompson about the meeting at the Manhattan Club?

A. We had to discuss it with him, yes, sir.

Q. I am going to leave this meeting at the Manhattan Club, the first one, after one more question, which is repetitive probably but I want to make it clear.

During any part of that meeting do you now state that Mr. Baymiller did not ask Mr. Lysfjord if he could continue selling these Los Angeles accounts if he got a Flintkote line?

A. He did not.

Q. He did not? A. He did not.

Q. All right.

Then you get back to the office and either that day or the following day or the next day you did contact Mr. Thompson of the Flintkote Company?

A. Yes, sir.

Q. Who did, you and Mr. Baymiller, did the three of you sit down and talk?

A. I don't recall that contact. I was outside of the office most of the time. Possibly when I returned to pick up mail or literature or something of that nature, Mr. Baymiller and Mr. Thompson and myself got together and had the discussion.

(Testimony of Robert Eugene Ragland.)

Q. Do you recall such a discussion, Mr. Ragland? [860]

A. No, I don't recall it specifically.

Q. You don't recall having talked with Mr. Thompson yourself, I mean you yourself having talked to Mr. Thompson about this meeting?

A. No, sir, I don't.

Q. Do you recall prior to the second meeting at the same place having recommended the plaintiffs to Mr. Thompson as Flintkote outlets?

A. I can't specifically remember it. Undoubtedly I did.

Q. You must have?

A. I must have, that is correct.

Q. You wanted them on your team and you recommended them very highly whenever you could, didn't you? A. That is true.

Q. Now, do you know whether or not Mr. Baymiller had such conversation with Mr. Thompson? By "such conversation" I mean, do you know whether or not Mr. Baymiller related the facts of the first Manhattan Club meeting or made recommendations?

A. I don't know for sure if he did or not.

Q. But you do know that within 10 days or two weeks after the first meeting you had another meeting out at the Manhattan Club at which Mr. Thompson attended, don't you?

A. That is right. [861]

Q. And whether it was 10 days or two weeks or

(Testimony of Robert Eugene Ragland.)

12 days isn't important, Mr. Ragland, but it was about in that period?

A. Probably more a month.

Q. Now, at this meeting, Mr. Ragland, yourself, Mr. Baymiller, Mr. Thompson, Lysfjord and Waldron were present. How was that meeting arranged? Did you arrange it?

A. I believe I did by telephone.

Q. In other words, your recollection is you called Mr. Lysfjord, who was still with the Downer Company, and Mr. Waldron who was still there at that time, wasn't he?

A. I contacted one or the other because the one would give the message to the other.

Q. Yes. And you arranged this second luncheon meeting at the Manhattan Club?

A. Yes, sir.

Q. Will you tell us how that took place, I mean, did you all arrive together, did the three Flintkote people arrive together, or just what happened?

A. I believe Mr. Thompson, Mr. Baymiller and myself left from the Flintkote offices to the designated spot, and Mr. Waldron and Mr. Lysfjord came in their respective cars separately. I don't know if we were there first or they were there, or how it was. We all got together. I am sure I was the man that made the introductions, and after the introductions I was more or less in the background. [862]

Q. Well, in making the introductions, did you

(Testimony of Robert Eugene Ragland.)

indicate that you knew the sales ability of these two people that you wanted on your team?

A. I believe I had stated that, yes.

Q. You recommended them to Mr. Thompson at this meeting? A. Yes, sir.

Q. And did Mr. Baymiller say anything?

A. No, I believe Mr. Baymiller was listening quite as much as I was, too.

Q. He had more or less heard it at the prior meeting, hadn't he? A. That is right.

Q. But at this meeting Mr. Lysfjord did bring this portfolio of signed contracts?

A. Yes, he did.

Q. Which he was giving to the Downer Company? A. Yes.

Q. And isn't it true that Mr. Thompson was quite impressed with that type of business?

A. Well, that is a question Mr. Thompson will have to answer. It seemed to me—there again it is supposition—it seemed to me like he was.

Q. Did he say so?

A. I can't recall his exact words. I can give you what [863] he might have said.

Q. Let me say, didn't he say, in effect, that this is wonderful, do you think you can keep this up, and so forth?

A. I can't speak for Mr. Thompson again on that.

Q. No, I am asking you if Mr. Thompson said something in your presence at this meeting to that effect, Mr. Ragland, not what was in his mind.

(Testimony of Robert Eugene Ragland.)

A. It doesn't seem to me like he said words like that. He said something to that effect. He said undoubtedly—I don't believe Mr. Thompson is a man that is easily impressed.

Q. But he was impressed with these contracts that Lysfjord had picked up within a few days, wasn't he?

A. To be polite he might have been.

Q. Well, he stated he was, that is what I mean. He said, "This is wonderful, can you keep it up," or something to that effect, didn't he?

A. Possibly he did; yes.

Q. Now had you indicated to Mr. Thompson either at this meeting or prior thereto that you wanted Waldron and Lysfjord on the Flintkote acoustical tile team?

A. I didn't hear the first part of your question.

Q. Had you stated, either prior to this meeting or at this meeting, or did you indicate at this meeting, that you still wanted Waldron and Lysfjord on the acoustical tile team of Flintkote? [864]

A. I did.

Q. At all times you recommended them very highly to whoever you talked to?

A. Every chance I got.

Q. Every chance you got, that is right.

So that at this meeting you had Mr. Thompson, who was general sales manager, was he not—he was above Mr. Baymiller?

A. He was above Mr. Baymiller, yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. And Mr. Baymiller was assistant sales manager?
A. Yes, sir.

Q. And Thompson was sales manager?

A. Yes, sir.

Q. And you were promotion man for acoustical tile in the area?
A. Yes, that is right. [865]

Q. Now, Thompson saw these contracts, of course, that Lysfjord brought, didn't he?

A. Yes, sir, he did look at them.

Q. Now, this meeting, I believe you stated, lasted during the lunch hour and for about an hour thereafter. I take it that would be about two hours, wouldn't it?

A. An hour or an hour and a half, something like that, I guess.

Q. Hour and a half, maybe two hours. Now, do you recall or don't you recall, Mr. Ragland, that at this meeting, the first meeting Mr. Waldron attended, he told Mr. Thompson that there would be some stiff opposition if they were given Flintkote line of tile?

Do you recall a statement like that from Mr. Waldron? You have had a chance to think of it since the other day.
A. No.

Q. Do you recall it?
A. No, I don't.

Q. You don't recall whether Mr. Waldron made such a statement?
A. No, I don't.

Q. And you don't recall then, I take it, whether he, in connection with the same statement, said something to the effect—and I am stating this generally, just like you have to state conversations—

(Testimony of Robert Eugene Ragland.)

he said something to the effect that [866] these acoustical tile contractors were not competing and gotten together and they would apply pressure when a new competitor came in the field? Do you recall that statement or something to that effect?

A. No, sir, I don't.

Q. Then, of course, I take it you don't recall whether or not Mr. Thompson, in response to such a statement, said that Flintkote wouldn't be subject to pressure. That it was a big company and they made up their own mind, and so on? Do you recall Mr. Thompson saying anything like that?

A. No, sir.

Q. Now, you don't recall anything about Mr. Thompson saying Flintkote couldn't be pressured, or anything of that sort?

A. No, sir, I don't recall the use of the word "pressure" at any time.

Q. Do you recall Mr. Thompson saying that, in effect, if they accepted these people as outlets, that whatever pressure came from competing contractors wouldn't affect them, that is, Flintkote could take care of itself, that it was a big company? If you don't follow my words, I just want that thought. Did Mr. Thompson express that thought?

A. No, I don't recall any expression of that nature.

Q. You just don't recall. All right. Now, do you recall—you stated on direct examination that Mr. Thompson, [867] after I assume he had seen these nice contracts that Lysfjord exhibited, did he say

(Testimony of Robert Eugene Ragland.)

anything about—at that meeting, the second meeting that Lysfjord would no longer be able to continue to sell these people if he got Flintkote tile? Did Mr. Thompson ever make such a statement at that meeting? A. No.

Q. Those contracts that he exhibited, do you recall the contractors?

A. Jackson Brothers, I recall definitely.

Q. Hagen-Lee?

A. Hagen-Lee may have been included, I don't recall.

Q. There were a few others, were they not, Mr. Ragland? A. There may have been.

Q. At that meeting, isn't it a fact, Mr. Ragland, that either you or Mr. Baymiller or Mr. Thompson, any one of you, expressed in words a satisfaction that if the plaintiffs became Flintkote dealers they would be the only exclusive outlet Flintkote had?

A. If they made the statement, which I don't recall, it would have been a false one.

Q. You have testified, haven't you, that you had no other outlet in this area that handled exclusively Flintkote tile?

A. You referred to Los Angeles?

Q. Yes. That is true, anyway, isn't it, in the Los [868] Angeles County area, that they would have been the only outlet handling exclusively Flintkote tile?

A. If we had intended them to work in Los Angeles, they would have.

(Testimony of Robert Eugene Ragland.)

Q. Was anything said along that line?

A. No, sir.

Q. You don't recall, or do you say no?

A. No.

Q. And to make it certain, Mr. Thompson didn't make any statement like that? A. No.

Q. You didn't? A. I didn't.

Q. And Mr. Baymiller didn't. A. No.

Q. Now, you stated you didn't recall the preliminary question to this, Mr. Ragland. But do you recall any conversation of Mr. Thompson at this meeting to the effect—after he had seen these contracts—to the effect that maybe Lysfjord would be able to sell those people, providing they couldn't be sold otherwise by someone else?

A. I believe he made a remark similar to that. I don't recall the exact words he used.

Q. That was your direct testimony, anyway, wasn't it?

A. Yes, he would take a look at anything of that nature [869] that did arise.

Q. After he had determined that, nobody else would sell them? A. Yes, sir.

Q. If no other acoustical tile contractor could sell it, he would decide whether or not Waldron and Lysfjord might take a crack at it, is that the gist of what you meant to say yesterday?

A. That could have been, yes.

Q. That could have been what you meant to say yesterday? A. Yes.

Q. All right. Then I take it that what Mr. Bay-

(Testimony of Robert Eugene Ragland.)

miller, by the words you heard, that he would rather have Armstrong, Celotex, U. S. Gyp, National Gyp, anybody sell these big contractors, rather than let these people sell Flintkote tile?

Mr. Black: That is objected to as assuming a fact not in evidence. It is argumentative, furthermore, rather than a direct question.

Mr. Ackerson: I want to know whether that was his understanding.

The Court: Objection sustained.

Q. (By Mr. Ackerson): Now, is there anything else that you remember stated at this second meeting at the Manhattan Supper Club? Did you say anything else? Did Lysfjord say [870] anything else? Did Waldron say anything else?

A. Lysfjord mentioned the fact that he would like to buy a fishing boat to entertain future customers; that I recall.

Q. What did anybody say in response to that suggestion? A. "Good idea."

Q. And—very well. You didn't think, Mr. Ragland, he was going to park a fishing boat up at San Bernardino, did you?

A. Well, there is a man out there now that has one down there.

Q. All right. But the fishing boat was brought up? A. Yes, sir, it was.

Q. For the entertainment of customers?

A. Yes, sir.

Q. Mr. Thompson and Mr. Baymiller said they thought that was a good publicity idea?

(Testimony of Robert Eugene Ragland.)

A. Yes, sir.

Q. At that meeting didn't Mr. Lysfjord or Mr. Waldron also bring up the idea of stationery, listing products and activities on the border and—

A. The only thing I recall in connection with advertising was an emblem they thought they would like to use at that time. It was the comedy and tragedy emblems you see so much on theatre programs. [871]

I guess it was assuming that if they got a job they were happy and if they didn't they were unhappy.

Q. They discussed advertising on the stationery, anyway, didn't they?

A. That is what I recall.

Q. Yes. Well now, we have covered this second meeting. Then what happened, Mr. Ragland? How did the meeting break up? What was decided, if anything?

A. One of the things that it broke up on was that—I recall going to my car and getting—or, the car that Mr. Baymiller and Mr. Thompson and I came in, and getting a piece of literature to give to Mr. Waldron, who at that time I don't believe had that piece of literature.

Q. Do you recall what the literature was about?

A. It must have been an acoustical tile brochure that we use, Flintkote uses.

Also, Mr. Thompson stated that he would consider the presentation that these two gentlemen had made

(Testimony of Robert Eugene Ragland.)

to us and would advise them when a future meeting was necessary.

Q. Well, could you state from the general tenor of the meeting, the way it broke up, that these two boys were prettly likely to be on the Flintkote team? Did you agree to talk it over with Mr. Harkins, as the final word?

A. Mr. Thompson would have talked it over with Mr. Harkins, yes. [872]

Q. In other words, when Mr. Thompson left that meeting he wanted these people on his team, too, didn't he?

A. That is the impression he gave me.

Q. All right. After the meeting, then you went back to the office, I take it? A. Yes, sir.

Q. Did you report to Mr. Harkins?

A. No, sir.

Q. When did you report to Mr. Harkins, if you did?

A. I don't think I ever did. Mr. Thompson would arrange that.

Q. Well, what happened next?

A. After a period of time, possibly another month, I was told that a meeting had been arranged to introduce these two plaintiffs to Mr. Harkins.

Q. At that time were you informed that they had been approved as acoustical tile, Flintkote acoustical tile dealers?

A. No, I was not informed.

Q. Did you know that otherwise, from Mr. Thompson?

(Testimony of Robert Eugene Ragland.)

A. I had every reason to believe they would be, but I had no cognitive certitude they were.

Q. That was the purpose of meeting Mr. Harkins, was it?

A. Yes, sir; final approval, yes.

Q. You say this was maybe a month after the second meeting? Could it have been two weeks, ten days? [873]

A. It could have been any lapse of time. I am sure it was—let's say from ten days to a month.

Q. It was before the 2nd or the—it was before the 1st of December, 1951, in any event, wasn't it?

A. It could have been. [874]

Q. Did you arrange this meeting with the plaintiffs, this third meeting?

A. I did the telephoning, yes, sir. I telephoned them at the Downer Company and told them that the way was clear for them to meet Mr. Harkins, and could they make the date, and I was given an affirmative answer, and they came down to the office.

Q. Did you tell them on that telephone conversation, them or one of them, that they had been accepted? A. No, sir.

Q. What time of day was this meeting, Mr. Ragland?

A. I believe around 11:00 o'clock in the morning.

Q. Well, I take it then they arrived together at the Flintkote offices? A. I believe they did.

Q. And did they proceed to your office, Mr. Thompson's office, or Mr. Baymiller's office?

(Testimony of Robert Eugene Ragland.)

A. I believe I was informed by the switchboard girl that they were out in the lobby, and I went out and got them and brought them back to our general sales office.

Q. Would that be yours and Mr. Thompson's and Mr. Baymiller's?

A. No, Mr. Thompson had his own office. Mr. Baymiller had an adjoining office. The salesmen using the office had one large community desk out in front of those offices. [875]

Q. Then I take it you took them to this community desk, is that right? A. Yes, sir.

Q. Then what happened? Did you subsequently take them next into Mr. Baymiller's office?

A. No. As soon as I saw that Mr. Thompson wasn't busy, I caught his attention and we let Mr. Harkins' secretary know that the two men were present.

Q. Who is she?

A. I don't recall her name.

Q. Is it Miss Dobkins?

A. No. I don't recall her. It wasn't Dobkins. Dobkins was the switchboard girl.

Q. Go ahead. Tell us what happened. You took them first to the general salesmen's desk.

A. And when we were told that Mr. Harkins was free, Mr. Thompson and I escorted them over to Mr. Harkins' office and introduced them.

Q. Let me stop you there just a minute.

You mean to say that neither of the plaintiffs

(Testimony of Robert Eugene Ragland.)

talked with Mr. Thompson nor Mr. Baymiller prior to them being escorted to Mr. Harkins' office?

A. Oh, certainly. They were greeted.

Q. What were the salutations? You are in, you are part of the team now, congratulations? [876]

A. No, there was nothing like that. The opportunity is here. Mr. Harkins is free. Let's go talk to him.

Q. You mean that until these people got in Mr. Harkins' office they didn't know they had been accepted as Flintkote acoustical tile dealers?

A. No, sir.

Q. At that time, Mr. Ragland—may I see your copy of that financial statement, Mr. Doty—these people, the plaintiffs, brought a financial statement at either your, Mr. Baymiller's or Mr. Thompson's request at the prior meeting, did they not?

A. Yes, they did.

Q. May I show you this and ask you if this is the financial statement that was brought—your counsel has handed it to me.

We can state that, can't we, Mr. Black, for the witness' benefit?

Mr. Black: I think that is correct.

Mr. Ackerson: That this came from the Flintkote files?

Mr. Black: As far as we know, it is the one that we had.

Q. (By Mr. Ackerson): Do you recognize that as the financial statement?

(Testimony of Robert Eugene Ragland.)

A. (Examining Exhibit): I can't swear that it is the same one.

Q. But you saw a similar financial [877] statement?

A. That is just about how I looked at it because it wasn't my job to look at them.

Q. This has your name on it. Is that your writing? A. No, sir, that isn't my handwriting.

Q. But you have seen this when it was brought in that day, didn't you?

A. Yes, sir, if that is the same one.

Mr. Ackerson: Do you mind if I ask that this be marked for identification? You have no further use for it, Mr. Black?

Mr. Black: We may want to refer to it.

Mr. Ackerson: I will mark it only for identification unless we can stipulate it is identical to Plaintiffs' Exhibit—

Mr. Doty: It is not identical so we better put it in.

Mr. Ackerson: I would like to ask to have it marked for identification.

Mr. Black: No objection.

The Clerk: That will be Plaintiffs' Exhibit 44 for identification.

(The document referred to was marked Plaintiffs' Exhibit No. 44 for identification.)

Q. (By Mr. Ackerson): Now, Mr. Ragland, did you yourself take—let's get the chronology here—the plaintiffs came in, they stood at your general

(Testimony of Robert Eugene Ragland.)

sales desk, Mr. Thompson came out to greet them, did he? [878] A. Yes.

Q. Did Mr. Baymiller likewise come out?

A. I don't recall Baymiller at that meeting.

Q. Now, then, you stated that you and Mr. Thompson escorted them into Mr. Harkins' office?

A. Yes, sir.

Q. Was Mr. Harkins what we call in the vernacular the top boss down there in your field?

A. He was the top man as far as I was concerned, yes, sir.

Q. He was what, he was general sales manager?

A. He was general sales manager of the Pioneer Division.

Q. For the 11 western states or something?

A. Yes.

Q. For all building materials?

A. All building materials, yes, sir.

Q. Now are you sure you took these people into Mr. Harkins' office?

A. I am quite sure I was present, yes, sir.

Q. And did you remain there during the time that these people remained in Mr. Harkins' office?

A. That question has been asked of me before. I am not sure if I did or not. I think I did.

Q. Well, yesterday—if I am mistaken here, Mr. Ragland, correct me; my memory isn't infallible—but I understood [879] you to testify yesterday as to conversations between plaintiffs and Mr. Harkins taking place in Mr. Harkins' office on this occasion. A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. Are you positive of that? A. Yes, sir.

Q. Now was Mr. Thompson likewise in there?

A. Yes, he was.

Q. Did he remain all the time you did?

A. To my knowledge, yes, sir.

Q. You mean to your recollection or to your knowledge? A. To my best recollection.

Q. Now to your best recollection, did you both remain in there, or either of you remain in there, all the time the plaintiffs were in Mr. Harkins' office? A. I believe we did.

Q. Well, tell us what occurred in Mr. Harkins' office. I take it you made introductions, this is Mr. Lysfjord and Mr. Waldron?

A. Yes, I did that.

Q. Did you also say that these are the two new accounts that we have been talking about?

A. I told them that these were the two men we had talked about to him, and that they were to be our new applicators in the San Bernardino-Riverside area. [880]

Q. Did you remain in there and hear Mr. Harkins talk about this Ryan Aircraft job out near Pomona?

A. No, I don't recall any Ryan Aircraft job.

Q. Do you know, Mr. Ragland, whether or not Flintkote sold the roofing on that job?

A. No, sir.

Q. You don't remember anything about Mr. Harkins mentioning that job?

A. No, sir, I don't.

(Testimony of Robert Eugene Ragland.)

Q. Will you state that Mr. Harkins then did not say to these plaintiffs that they should get the pencil sharpened and go out and figure on the acoustical tile on that job?

A. I would like to give you an answer on that.

Q. Well, do you remember such a conversation? Then if you want to explain it, you can.

A. It isn't at all logical that that conversation or that statement was ever made.

Q. Well——

The Court: Can you remember whether it was made or not?

Q. (By Mr. Ackerson): Was it made?

A. No, I don't recall anything like that.

Q. You don't remember either for certain whether you were in there all the time the plaintiffs were in there, do you? [881]

A. I can't say that I was, but I do remember.

Q. And you didn't mean yesterday to say that you were there all the time they were in there either, did you?

A. To the best of my recollection what I said yesterday was true.

Q. Well, did you say yesterday that your best recollection today is that you were in there all the time? A. I think I was, yes, sir.

Q. Well, now, tell us how this Mr. McAdow—he is your credit manager down there, isn't he?

(Testimony of Robert Eugene Ragland.)

A. Yes, sir.

Q. He came into this picture at some stage, didn't he? Was that before you went into Mr. Harkins' office or after?

A. That was after the Harkins meeting.

Q. And I take it that you took this Plaintiffs' Exhibit 44 for identification, the financial statement, and it was given to Mr. McAdow, wasn't it?

A. That is correct.

Q. And your statement yesterday was that Mr. McAdow took it, congratulated these people and said something about he hoped he would see them again, or something to that effect?

A. Words to that effect.

Q. Well, now, Mr. Ragland, I seem to recognize this handwriting. It might be Mr. Doty's, I don't know.

Mr. Doty: It is not mine. [882]

Q. (By Mr. Ackerson): Do you recognize the "Bob Ragland" that is written here, whose handwriting that is? Is that Mr. McAdow's?

A. I don't know.

The Court: What are you showing him?

Mr. Ackerson: I am showing you Plaintiffs' Exhibit 44 for identification and the longhand notation on the first inside page.

The Witness: I understand what you are showing me. [883]

Q. Yes, I know. The record has to show it. I am just trying to help you.

(Testimony of Robert Eugene Ragland.)

The Court: We just want our stenographic record here to be complete.

The Witness: No, I don't recognize the handwriting; it is my name.

Q. (By Mr. Ackerson): This was in your possession, of course, at one time or another after this meeting you are talking about, wasn't it?

A. I don't believe that was ever in my possession.

Q. You now are saying you never saw this before? A. I saw it on Mr. McAdow's desk.

Q. Let me ask you this then, Mr. Ragland: This document, this financial statement, Plaintiffs' Exhibit 44 for identification, was expressly requested by Mr. Thompson at the previous meeting?

Mr. Black: Pardon me. The reporter can't get a nod, Mr. Ragland.

The Witness: Yes.

Q. (By Mr. Ackerson): And it was produced at the next subsequent meeting with Mr. Harkins at this time, as a result of that request?

A. I don't recall if Mr. Harkins saw that or not.

Q. No. But it was produced at the Flintkote offices at this time? [884]

A. At the concurring meeting, yes, sir.

Q. Now, as promotional man for acoustical Flintkote tile you know that it was important for Flintkote to know the financial standing of these people before you agreed to sell them tile, didn't you?

A. Yes, I know that it is important to have some money if you are going to buy anything.

(Testimony of Robert Eugene Ragland.)

Q. And you had to find out, Flintkote had to find out whether these people had anything?

A. Yes; very particular about that.

Q. It is also true Mr. Thompson would want to know before he would recommend it to Mr. Harkins?

A. Very definitely.

Q. And Mr. Harkins would want to know before he said, "Okay, you are in," wouldn't he? Or else he would want Mr. Thompson's word for it.

A. He would want Mr. Thompson's word.

Q. Yes. So that, I take it, you would say, at least, that either yourself, Mr. Baymiller, Mr. Thompson, after requesting this document, Exhibit 44 for identification, at least examined it, didn't you?

Can you refresh your recollection on that?

A. No, I don't recall examining that myself. I don't recall Mr. Thompson examining it.

Q. Well, as an employee in promotional, or, and [885] promotional manager, a promotional man for acoustical tile for Flintkote, and having gone through all these negotiations, would you state had they found, had anybody in Flintkote found, after examining this document (indicating), that the financial structure wasn't adequate that they would have approved and shipped the first carload of tile?

A. They would not.

Q. They would not, would they? A. No.

Q. They had to examine this document before they would go out on a limb for \$6,000 carload of tile, wouldn't they? A. Very definitely.

(Testimony of Robert Eugene Ragland.)

Q. Now, I am going to call your attention to the fact that this financial statement we are talking about, Plaintiffs' Exhibit 44 for identification, I want you to examine that and see if you can tell me any reference to San Bernardino or Riverside in that document? A. The only——

Q. Address or otherwise.

A. There is only one thing that connotes any geographical location, and that is the word "Arizona" down here (indicating).

Q. What does that say?

A. "Frank M. Hamiel, Public Accountant, Arizona 3—" That is his telephone number. [886]

Q. That is the accountant's address?

A. Yes, sir.

Q. Let me see if I can direct your attention to something else right on the front cover, "aabeta co., Los Angeles." Isn't that on there in capital letters?

A. It is now.

Q. I assure you I have never seen this document until today, so it must have been on there when you received it. A. I am sure it wasn't.

Mr. Ackerson: Well, Mr. Black, you didn't——

The Court: Let's be certain. I am not sure we all heard the witness' answer.

Will you read it, please?

(The answer was read.)

Mr. Ackerson: I am sure you didn't put "Los Angeles" on this, Mr. Black, after it came into your possession.

(Testimony of Robert Eugene Ragland.)

The Court: Let's be certain we have identified on the document what the witness said wasn't there when he first saw it.

Mr. Witness, put a circle around it with this red pencil, so it can be properly identified.

(Witness complies.)

Q. (By Mr. Ackerson): You are identifying the words "Los Angeles" under "aabeta co." on the front of the cover page of Plaintiffs' Exhibit 44 for identification? [887] A. Yes.

Q. You are certain those two words were not there when you saw it?

A. I am positive they weren't.

Mr. Ackerson: Well, I would like——

The Court: You are speaking as of the time you last saw it, before you came to the stand today, or as of some other time?

The Witness: No, I know they weren't there when we first were handed that manuscript.

Mr. Ackerson: Well, I would like the record to show, or, Mr. Black to stipulate, that the first time I saw this document was yesterday, and the first time it has ever been in my hands is today.

I would like to have him stipulate further that he received it directly from Flintkote Company.

Will you do that, Mr. Black?

Mr. Black: I so stipulate. I don't know when you saw it before——

Mr. Ackerson: I think it was yesterday or the day before.

(Testimony of Robert Eugene Ragland.)

Mr. Black: I know Mr. Doty was negotiating with you on documents a long time.

Mr. Ackerson: I have never seen that before, have I, Mr. Doty?

Mr. Doty: Not that I know of. [888]

Mr. Ackerson: I have never had it in my hands until today?

Mr. Doty: Not that I know of.

Mr. Ackerson: So far as you know, Mr. Doty, you got it directly from Flintkote and it has at all times been in your hands since then?

Mr. Doty: As far as I know, that is right.

Q. (By Mr. Ackerson): Now, neither Mr. Harkins—or did either Mr. Harkins, Mr. Thompson, Mr. McAdow or Mr. Baymiller ever question or ever bring up the fact to you that this Plaintiffs' Exhibit 44 for identification listed the aabeta co.'s address as Los Angeles instead of San Bernardino? Was that ever called to your attention, until right now, today? A. No, sir.

Q. Nobody ever mentioned it? A. No.

Q. Now, Mr. Ragland, you stated yesterday, in response to Mr. Black's questions, certain answers concerning this job that the plaintiffs did for Owens Roofing Company? A. Yes.

Q. As I recall it, you said a man named Anderson—— A. That is correct.

Q. ——who is a salesman or employee of Owens Roofing——

A. No, Flintkote employee. Flintkote salesman.

Q. Anderson was the Flintkote roofing sales-

(Testimony of Robert Eugene Ragland.)

man. [889] A. Yes, sir.

Q. I see. He came into your office and Mr. Lysfjord happened to be there, is that right?

A. As I recall it, that is what it was.

Q. Do you recall whether that was in December or January, or when?

A. I believe I recalled yesterday that was between Christmas and New Year's.

Q. At that time, of course, Mr. Lysfjord was still finishing up with the Downer Company?

A. Still employed by the Downer Company.

Q. Anyway, your story went as follows—correct me if I am wrong—Mr. Lysfjord happened to be in the Flintkote offices at the time Anderson came in?

A. Yes.

Q. Anderson said, in substance, that the Owens Roofing Company wanted an acoustical tile job, is that right?

A. They wanted to purchase some material, acoustical tile material.

Q. What did you say to Mr. Anderson?

A. I told him he would have to—we couldn't sell, The Flintkote Company as a manufacturer couldn't sell a roofer acoustical tile directly. He would have to buy it through one of our contractor outlets, such as R. E. Howard.

Q. Then you said that and not Mr. [890] Baymiller? A. It was stated by both of us.

Q. You both said it? A. Yes.

Q. Well, tell us what—did Mr. Baymiller stay there all the time Lysfjord was talking about this?

(Testimony of Robert Eugene Ragland.)

A. No, I don't believe Mr. Baymiller did. He is always quite busy when he is in the office and the occasion for his coming out to that particular desk was the knowledge that Mr. Lysfjord was present and he came out to give him a greeting.

Q. Welcome him into the family? A. Yes.

Q. Anyway, you are sure you said, "No, you have to go to Howard, or somebody"?

A. That is right.

Q. Well, all right. Then I believe you stated Lysfjord said, "I would like to have that job"?

A. "I would like to do the work."

Q. "I would like to do that job"?

A. Yes.

Q. And did you then state, "Well, this is a chance to pick up a few dollars while you are getting organized"?

A. Yes. I said that "Here is a chance to make an extra twenty-five or fifty dollars, while you are still getting organized in your new company." [891]

Q. Did you say \$25 or \$50?

A. Yes, sir. That is wages, \$25 a day.

Q. But you did say, "Go ahead and apply the tile"?

A. No, I didn't say that. I took him down with Mr. Anderson. I had never heard of Owens Roofing Company before.

Q. Let's get it straight. After Lysfjord said, "I would like to do this job," you took Lysfjord and you went down to Owens Bros. Roofing, is that right? A. Yes, sir, with Mr. Anderson.

(Testimony of Robert Eugene Ragland.)

Q. I believe you stated you talked to the senior Mr. McLane down there?

A. I believe that was the man, yes.

Q. And you had never met him before?

A. No.

Q. Are you sure it wasn't Mr. McLane, Jr., the son?

A. No, I am not sure. I have since questioned Mr. Anderson and he told me it was Senior.

Q. At the time you testified yesterday, did you know that Mr. McLane, Sr., was deceased?

A. Yes, sir, I did.

Q. You don't know for certain whether it was Mr. McLane, Sr., or Mr. McLane, Jr.?

A. Only Mr. Anderson's statements to me.

Q. But you did talk to a Mr. McLane?

A. Yes, sir. [892]

Q. I am going to show you a letter, Mr. Ragland, and I am going to ask you if this refreshes your recollection.

Mr. Ackerson: I will ask it be marked Plaintiff's Exhibit for identification in order.

The Clerk: Plaintiff's 45 for identification.

(The document referred to was marked Plaintiffs' Exhibit 45 for identification.)

Mr. Black: Isn't that the 1954 letter?

Mr. Ackerson: That is right.

Q. (By Mr. Ackerson): Now I show you a letter that is addressed to aabeta co., Plaintiffs' Ex-

(Testimony of Robert Eugene Ragland.)

hibit 45 for identification, purporting to have been signed by R. James McLane.

Can you tell from that letter, after reading it, whether or not you talked to the signatory of that letter or the other McLane on there, listed on the letterhead? A. No, I can't tell you. [893]

Q. But are the contents of that letter substantially correct? A. No, sir.

Q. Did you recommend aabeta company to do that job?

A. I recommended them to put the material in, yes, sir.

Q. Well, that is substantially what the letter says, isn't it?

A. I have seen this letter before.

Q. Well, I know, but what is your answer? Are the contents substantially correct? Did you recommend——

A. There are a number of things in that letter that are not true.

Q. Well, is the fact that you did recommend the aabeta company to the Owens Company true?

A. I recommended two men to put the job in, yes, sir.

Q. Two men, Lysfjord and Waldron?

A. That is right.

Mr. Ackerson: I am going to offer this at the present time, your Honor, Plaintiffs' Exhibit 45 into evidence.

Mr. Black: Objected to on the ground there is no foundation laid. This is a letter of 1954.

(Testimony of Robert Eugene Ragland.)

The Court: I do not think the date of it is controlling on whether it is admitted or not, but I do not recall, as I sit here now, what foundation there is for admitting this particular letter. [894]

Mr. Ackerson: Your Honor is right, and I think Mr. Black is right. I will have to lay a further foundation. I will leave it for identification until later.

The Court: All right. What is the number?

The Clerk: No. 45.

Mr. Ackerson: Plaintiffs' Exhibit 45 for identification, your Honor.

Q. Now, Mr. Ragland, let's get on to this first—prior to that, is Mr. Harkins still with the Flintkote Company? A. No, sir, he is not.

Q. When did he leave?

A. To the best of my knowledge I believe it was approximately March, 1954.

Q. Let us get to this first order of tile, Mr. Ragland. Your testimony was to the effect that both plaintiffs came to the Flintkote offices and presented an order for a carload of tile, and you recall you said they were very proud, it was their first order, is that right? A. Yes, sir.

Q. And that was a written order, a signed order, wasn't it? A. Yes.

Q. That is the custom for Flintkote, isn't it, to have a signed order any time they sell a carload of tile? [895]

A. It is the general practice, yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. Is that signed order ordinarily put in the folder of the customer and kept as a record?

A. It is usually attached to the original order.

Mr. Ackerson: Have you been able to find that record yet, Mr. Doty?

Mr. Doty: No.

Q. (By Mr. Ackerson): Did you have anything to do with trying to find that original order by the aabeta company? A. No, sir.

Q. You don't know whether a search was made for it or not?

A. I am sure a search has been made. I don't have anything to do with the orders.

Q. Did you know whether or not the order was ever found? A. No, sir, I don't.

Q. You did state yesterday, though, that you personally examined this order?

A. I believe I did, yes, sir.

Q. Well, they brought it in and showed it to you, you said? A. That is right.

Q. And do you recall that the order had an order number [896] on it, aabeta order number?

A. It didn't have the words "aabeta" on it; it was a standard purchase order blank, I guess that you can buy at any dime store or stationery counter.

Q. Who was it signed by?

A. I don't recall.

Q. Either Lysfjord or Waldron?

A. One of the two, yes, sir.

Q. Or the aabeta company? A. Yes, sir.

Q. Now you stated yesterday also that you per-

(Testimony of Robert Eugene Ragland.)

sonally advised the plaintiffs as to what the fastest selling sizes of tile was, and you said three-quarter inch 12 x 12 and one-half inch 12 x 12, didn't you?

A. Yes, sir.

Q. And that that was the extent of your participation in initiating this first order of tile?

A. Yes, sir.

Q. Now isn't it a fact, Mr. Ragland, that you contacted the plaintiffs and said, in effect, "Look, our plant in Hilo is going to be shut down for repairs, you had better get an emergency order in here so you will have something when you need it"; didn't you tell them about the shutdown at Hilo?

A. I could have told them, yes. That was [897] common knowledge.

Q. But you didn't remember that yesterday?

A. I don't recall.

Q. Well, now, let me ask you this, Mr. Ragland: As a matter of fact, it is true, isn't it, that you called one of these people, Mr. Waldron—in fact it was Mr. Waldron—at the Bell address on Atlantic Boulevard and made an appointment for the purpose of initiating this first order of tile?

A. I couldn't have done that.

Q. Is your answer no? A. No.

Q. And will you state that Mr. Lysfjord came into that meeting from the Downer Company and met you at the Bell Avenue address?

A. No, I won't state that.

Q. It is not true, you say?

(Testimony of Robert Eugene Ragland.)

A. It is not true, that is correct.

Q. And is it not true that after the three of you met at the Bell Avenue address on Atlantic Boulevard you went from there to this Plantation Inn instead of from The Flintkote Company, as you stated yesterday?

A. No, the way I stated it yesterday was chronologically correct.

Q. So you still stand on your testimony?

A. Yes, sir. [898]

Q. That you never were at the Bell plant or never knew of its existence until sometime in February when you were investigating rumors, is that right? A. That is absolutely correct.

Q. Well, then, you state in accordance with your yesterday's testimony, your testimony of yesterday, that these two plaintiffs came in with a signed order blank—did you advise them before or after that about what the sizes to order?

A. I advised them before, by telephone.

Q. Mr. Ragland, either of these two people then had had a great deal more experience in sales of acoustical tile than you had at that time, isn't that true? A. No, sir.

Q. They hadn't sold more contractors tile than you had up to that time?

A. That would be a matter of comparison.

Q. Well, they had, at least sold enough tile as top salesmen for Downer Company, and before that Coast and Shugart, to know which tile sold the fastest and was needed the most, didn't they?

(Testimony of Robert Eugene Ragland.)

A. No, I don't think so.

Q. It is your statement that they didn't know from their own experience that you sold mostly one-half inch 12 x 12 and the next three-quarter inch 12 x 12 tile?

A. They could have supposed that from their experience, [899] what they were selling the most of, but I don't believe either one of them were ever in a position to do any ordering before. That is usually management's job in acoustical contractors' organizations.

Q. Mr. Ragland, without arguing the point, they were as experienced in what contractors were putting in buildings, at least as experienced as you were, through their past sales experience; were they not?

A. Well, I am not going to say that they were inferior to me in any respect. They had had selling experience, and so had I.

Q. Didn't they ask you about what sizes to purchase in this first carload of tile or did you volunteer?

A. No, they requested my assistance as to the composition of a car.

Q. By the composition of a car, what do you mean?

A. What would be the most expedient material for them to lay in a warehouse as a first order.

Q. They asked you for the advice you state and you gave it to them? A. Yes, sir.

Q. Now you don't remember today, then, for

(Testimony of Robert Eugene Ragland.)

certain whether you told them about the Hilo plant going to be closed down for repairs or not?

A. I don't recall telling them that, though it is very [900] possible I did.

Q. So then I take it that your testimony, by your testimony of yesterday you didn't mean that these people just came in here with a signed order, proudly but unexpectedly, and said, "Fill it"?

A. No, I didn't, or I didn't mean to convey that idea.

Q. Well, the Hilo plant did close down, didn't it? A. I imagine it did, yes, sir.

Q. Well, I will show you—

May I have this marked Plaintiffs' for identification next in order?

The Clerk: Plaintiffs' Exhibit 46.

(The document referred to was marked Plaintiffs' Exhibit No. 46 for identification.)

(Exhibiting exhibit to counsel.)

Mr. Ackerson: May I offer this without foundation, Mr. Black?

Mr. Black: Yes, of course.

Mr. Ackerson: I will offer this in evidence as Plaintiffs' Exhibit 46.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 46.)

(Testimony of Robert Eugene Ragland.)

Q. (By Mr. Ackerson): I show you Plaintiffs' Exhibit 46, Mr. Ragland, and [901] ask you if that refreshes your recollection as to whether the Hilo plant did close down?

A. (Examining exhibit.)

Q. Does that refresh your recollection?

A. That is undoubtedly a fact, yes, sir.

Q. So that if you failed to state yesterday that you apprised these plaintiffs of the fact that the plant may close down, it was an inadvertence, is that your testimony today?

A. That is right.

Q. Now, Mr. Ragland, if I tell you that Mr. Lewis of your company—who is he, S. M. Lewis, I think it is?

A. Mr. Lewis is the assistant to Mr. Harkins at that time, assistant sales manager of the Pioneer division, building materials.

Q. And he stands in between Harkins and Thompson, I take it?

A. That could be the placement.

Q. If Mr. Lewis made the statement that this first order of Flintkote tile by the plaintiffs was phoned in, or must have been phoned in, your testimony is that he is mistaken? You saw the order?

A. I saw the order, yes, sir. [902]

Q. I am going to show you another document.

Mr. Ackerson: Can we have this marked Plaintiffs' 46 for identification?

The Clerk: Plaintiffs' 47.

Mr. Ackerson: 47, I beg your pardon.

(Testimony of Robert Eugene Ragland.)

(The document referred to was marked Plaintiffs' Exhibit 47 for identification.)

Mr. Doty: May we see that?

Mr. Ackerson: I beg your pardon.

Q. (By Mr. Ackerson): Can you identify this document, Plaintiffs' Exhibit 47 for identification, Mr. Ragland?

A. That is the literature that was available to our acoustical tile distributors at the time of this alleged operation.

Q. I want to ask you, Mr. Ragland, did you give such literature as this or some such literature as this to the plaintiffs or to either of them? Did you supply aabeta co. with this?

A. I am sure I did, yes, sir.

Q. Isn't it a fact, Mr. Ragland, that you mailed this document, or this type of document, Plaintiffs' Exhibit 47 for identification, to the aabeta address, the Bell address of plaintiffs' business at the aabeta co.?

A. Certainly didn't. It is five minutes driving time over there; I would have taken it. [903]

Q. You mean you would have driven over five minutes, rather than putting a postage stamp on it?

A. Surely.

Mr. Ackerson: I will offer it. Any objection, Mr. Black?

Mr. Black: No objection.

The Court: Received.

(Testimony of Robert Eugene Ragland.)

(The document referred to marked Plaintiffs' Exhibit 47, was received in evidence.)

Q. (By Mr. Ackerson): Now, let's go ahead on this first order of tile. You stated that according to your recollection the plaintiffs came down there? A. Yes, sir.

Q. Anything else happen? Who was there besides yourself?

A. I am sure I took the order in to Mr. McAdow, with Mr. Lysfjord and Mr. Waldron, for his credit approval on it.

Q. Now, you are positive that you took Mr. Waldron and Mr. Lysfjord along with their signed order into Mr. McAdow? A. Yes, sir.

Q. What did Mr. McAdow do?

A. Mr. McAdow said, what did I think of these two people. He said, "Anyone can prepare a statement like this. Do you believe they will pay their bills?" [904]

Q. In front of them? Did he state that while these plaintiffs were right there?

A. To the side, not—he wouldn't do that in front of them, naturally.

Q. While they were in his office?

A. Well, yes, sir. He said "Do you believe they will pay their bills?" He said, "In cases of this kind, where the finances are limited and a new organization starting out," he said, "do you believe that they will pay their bills?"

I said, "Yes, I do believe they will."

(Testimony of Robert Eugene Ragland.)

So he okayed it.

Q. In addition to the financial statement, which he had seen, certainly, by this time——

A. Yes.

Q. ——and in addition to a signed order blank, he still wanted assurance before he would ship a carload of tile, is that right?

A. That is right. He is a very cautious man.

Q. By the way, Mr. Ragland, when you were a salesman for Downer, what was your sales number?

A. For Shugart?

Q. No, for Flintkote. I mean, did you have a sales designation?

A. No. 90. I received my inner office correspondence by No. 90. [905]

Q. 90 or 9? A. 90, nine zero.

Q. Nine zero. Do you know anybody as No. 9? Was there such a salesman as No. 9?

A. There very definitely could have been one of the line salesman, one of the roofing men. I don't know any 9.

Q. It wouldn't have been any acoustical tile salesman for Flintkote?

A. I was the only acoustical tile salesman. 9 designation is for fiberboard up and down the coast.

Q. Your number was 90? A. Nine zero.

Q. There was nobody in your department, a salesman as No. 9?

A. There certainly could have been; I don't know him.

(Testimony of Robert Eugene Ragland.)

Q. But you wouldn't know him? You don't know him today, do you?

A. Whoever No. 9 happened to be, I would probably know him. What I mean is that 9 means nothing to me.

Q. Could 9 mean 90?

A. Not unless it says "90."

Q. Let me ask you this: Did you turn in the first Flintkote order for aabeta co.? It was handed to you. Did you turn it in to Mr. McAdow? [906]

A. Yes, sir, I did.

Q. All right. Then, let's see, I have an exhibit here.

Mr. Ackerson: I will ask it be marked for identification.

The Clerk: Plaintiffs' 48 for identification.

(The document referred to was marked Plaintiffs Exhibit 48 for identification.)

Q. (By Mr. Ackerson): Now, do you recognize this document, Plaintiffs' Exhibit 48 for identification?

Mr. Doty: Do you want the original?

Mr. Ackerson: What is that?

Mr. Doty: I say, do you want the original in lieu of that photocopy, which is a little bit illegible?

Mr. Ackerson: I think that this is all right. Thanks, Mr. Doty. We might substitute, if it is necessary.

The Witness: I believe this is an original order.

Q. (By Mr. Ackerson): That is your original

(Testimony of Robert Eugene Ragland.)

order? A. Flintkote's.

Q. Flintkote's original order? A. Yes.

Q. Do you see here, is there any place on that order that lists the customer's order number?

A. 2351, yes, sir. (Indicating.)

Q. Now, can you identify any of the handwriting on that? A. No, sir. [907]

Q. On that order blank? A. No, sir.

Q. Is any of it Mr. McAdow's?

A. Possibly, it could be.

Q. Any of it yours?

A. No, there is no—none of my writing or printing on that.

Q. Now, you turned this order in, didn't you?

A. Yes, sir.

Q. Aren't you the salesman listed on this order, salesman 9? A. No, sir.

Q. If there wasn't any other 9 salesman that would have been 9 or 90, either one, wouldn't it?

A. I would much rather receive \$90 than \$9. There was—my number, my sales number never appeared on an order. Everything I sold was a house account. It was credited to Mr. Thompson's sales or Mr. Maynard Felig in the San Francisco district or Mr. Schultz in the Seattle territory, when I was in those territories. Nothing ever would—

Q. Who was it credited to here, when you brought in an account?

A. A house account, it would go into the southwest district territory.

Q. Nobody got a credit for it? [908]

(Testimony of Robert Eugene Ragland.)

A. I was not on a commission basis.

Q. This sales number was merely—what purpose did it serve? Was this a territory then in 9, salesman 9?

A. No.

Q. Would that be southwest territory?

A. I can't explain the 9 on it.

Q. Unless it might have been 9 for 90?

A. The salesman we might have had in the San Bernardino territory.

Q. Do you know the salesman, as promotion chief did you know the salesman in the San Bernardino territory?

A. No. It is Mr. Davies. He is still there.

Q. What was his designation? Is it 9?

A. I don't know. We can find that out very easily.

Q. Did you see this document prepared?

A. No, sir, I didn't.

Q. Who prepares this document in your office, this type of document?

A. I believe it is prepared by our order department and I believe the man at that time was Joe Askins; A-s-k-i-n-s.

Q. Is Mr. Askins, do you recognize his handwriting any place here?

A. No, I don't know him well enough to.

Q. I call your attention to the fact that aabeta co.'s shipping instructions here call, first for 1085 Pacific [909] Avenue, and then it is changed in one place to 901 Waterman Street. And that latter address is what you saw in San Bernardino, isn't it?

(Testimony of Robert Eugene Ragland.)

A. 901 North Waterman, yes, sir.

Q. You saw the original order. Do you recall what address was on that original order? Was it the Pacific Avenue address?

A. I don't believe there was any address on the first order. And when Mr. McAdow was presented this order——

Q. By you? A. By Mr. Askins.

Q. I see. Then you don't know, you weren't there, or were you there?

A. I showed him the order. He said, "Fine. That is good. Will you vouch for these people?"

And I said I would.

He said, "Okay." And Mr. Askins was told to type up this order and as he did it Mr.—it was sent back to Mr. McAdow for his approval. [910]

Q. And you observed this?

A. No, sir, I don't observe that routine, that paper work.

Q. I see. You are telling the regular routine?

A. Yes, sir.

Q. But your statement is that the original order blank had no address on it, is that right?

A. I don't believe it had.

Mr. Ackerson: I will offer this.

Mr. Black: No objection.

The Court: Exhibit 48 is now offered into evidence. Any objection?

Mr. Black: No objection.

The Court: Received.

(Testimony of Robert Eugene Ragland.)

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 48.)

Q. (By Mr. Ackerson): Now, I take it, Mr. Ragland, that we have at least clear that you might have mentioned this closing of the Hilo plant in connection with this first order?

A. It is logical that I did, yes, sir.

Q. But you have no recollection of it?

A. No, I don't remember it.

Q. But you deny positively that you met both of these plaintiffs at their plant on the Atlantic Avenue address [911] prior to going to the Plantation Restaurant?

A. I deny that positively.

Q. And you deny positively that this order was written on a stationery pad brought along by Mr. Lysfjord and it was written at the Plantation Restaurant rather than at the Flintkote Company's offices, or being delivered to the Flintkote's office?

A. I deny that positively.

The Court: That was rather an involved denial. Were you denying writing it at the Plantation Restaurant, too?

Mr. Ackerson: I will break it down, your Honor.

Q. Do you deny that the order was actually written at the Plantation Restaurant while you were having lunch? A. I deny that.

Q. And you deny the further fact of prior to that going to the Plantation Restaurant and meeting at the Atlantic Avenue address of the aabeta

(Testimony of Robert Eugene Ragland.)

company? A. I deny that.

Q. And you state that the order was brought in about 11:00 o'clock prior to lunch this day by the two plaintiffs, signed, sealed and delivered?

A. Yes, sir.

Q. But the order had no shipping address on it?

A. I believe that is true.

Q. Now let's go to the subject of stationery. As I [912] recall your testimony yesterday—

The Court: Are you going into a new subject, Mr. Ackerson?

Mr. Ackerson: Yes, your Honor.

The Court: It is almost 4:30. I think we might adjourn until tomorrow.

Mr. Ackerson: At 1:30, your Honor?

The Court: Mr. Black had a civic duty to perform today; I have one to perform tomorrow. So we stand adjourned until tomorrow at 2:00 o'clock.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 2:00 o'clock p.m., Wednesday, May 18, 1955.) [913]

May 18, 1955; 2:00 o'Clock P.M.

Mr. Ackerson: Shall we proceed?

The Court: Proceed.

Mr. Ackerson: Will you take the stand again, Mr. Ragland?

ROBERT H. RAGLAND

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Mr. Ackerson: Mr. Black, may we have a stipulation that that is the handwriting of Mr. McAdow, subject to correction?

(Exhibiting document to counsel.)

Mr. Ackerson: I can use this, Mr. Doty. Thank you.

Mr. Doty: Here it is.

Mr. Ackerson: All right.

Cross-Examination

(Continued)

By Mr. Ackerson:

Q. Mr. Ragland, I would like you to—I am going to hand you again Plaintiffs' Exhibit 44 for identification; that is the financial statement from The Flintkote Company's files—and I will just ask you to examine that a moment.

A. (Examining exhibit.)

Mr. Ackerson: May I have this marked Plaintiffs' Exhibit for identification next in order?

The Clerk: Plaintiffs' Exhibit 49 for [915] identification.

(The document referred to was marked Plaintiffs' Exhibit No. 49 for identification.)

Q. (By Mr. Ackerson): Mr. Ragland, I show you Plaintiffs' Exhibit 49 for identification and

(Testimony of Robert Eugene Ragland.)

call your attention to the second sheet on that. Do you recognize that writing as being that of Mr. McAdow?

A. I wouldn't recognize Mr. McAdow's handwriting.

Mr. Ackerson: We have a stipulation, I believe, to the effect that it is Mr. McAdow's handwriting, do we not, Mr. Doty?

Mr. Doty: We think that it is Mr. McAdow's handwriting.

Mr. Ackerson: And subject to correction we can stipulate that it is?

Mr. Doty: Yes.

Mr. Ackerson: I am going to offer this, if I may, as Plaintiffs' Exhibit 49 in evidence.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 49.)

Mr. Ackerson: I would also like to offer Plaintiffs' 44 for identification in evidence at this time.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 44.) [916]

Q. (By Mr. Ackerson): Mr. Ragland, you will note on the first inside page of Plaintiffs' Exhibit 44, the financial statement, the words "Bob Ragland"?

A. Yes.

(Testimony of Robert Eugene Ragland.)

Q. And you testified that you are the only Bob Ragland down there? A. Yes, sir.

Q. You have seen this writing before, whether you can identify the writer or not, haven't you? You have seen that down at The Flintkote Company?

A. Well, I don't know if I have or not.

Mr. Black: I am sorry. I can't hear that.

The Witness: I am not qualified to say whether I have seen it or not. I guess I have.

Q. (By Mr. Ackerson): Does it look to you like the two "Bob Raglands" on 44 and 49 are the same handwriting?

A. There is a similarity, but there is also a dissimilarity.

Q. Would you say that the fact that your name was on this meant that it was to be returned to you or kept by you—I am referring to the financial statement, Exhibit 44? A. No.

Q. Can you think of any other reason that your name [917] would be on there?

A. Other than Mr. Waldron or Mr. Lysfjord wrote it there for me to present to me to be sure it got to me.

Q. Now let me call your attention to page 6 entitled "Schedule Shown Below Represents an Estimated or Projected Policy Which the Company Proposes to Follow During the First Three Months of Operation." Now do you note that the very first two lines on that page read "aabeta company, Los Angeles, California"? A. It does.

(Testimony of Robert Eugene Ragland.)

Q. And was that on there when you saw this document at the time it was presented?

A. I didn't examine it that closely to my knowledge.

Q. But you examined it yesterday and you find no reference whatever to San Bernardino or Riverside, do you? A. No, sir.

Mr. Ackerson: I am going to hand these two exhibits to the jury for comparison of these two "Bob Raglands" on the two exhibits.

(The exhibits referred to were passed to the jury.)

Q. (By Mr. Ackerson): Now, Mr. Ragland, there has been introduced in evidence as Defendants' Exhibit I a purported report—and again purported to have been made by you to Mr. Harkins—that concerns this investigation of the plaintiffs you talked [918] about? A. Yes, sir.

Q. Now you testified on direct examination, I believe, or on cross-examination, that you didn't know whether this card attached to this exhibit, the card of Elmer Lysfjord, where that came from?

A. That is correct.

Q. You did state, however—I will come to that in a moment.

Now you stated something about at about the time the plaintiffs came to The Flintkote Company and were approved as Flintkote dealers—I am talking about the Harkins meeting—that at or about that time you offered to supply the plaintiffs with cuts

(Testimony of Robert Eugene Ragland.)

to be used on the stationery from the Flintkote advertising agency, was it? A. Yes, sir. [919]

Q. And I believe you stated you took them over to the advertising man? A. I did.

Q. And did Mr. Lysfjord on that occasion, whether it was at that time or shortly subsequent thereto, did he get a cut from The Flintkote Company that day and take it with him?

A. I am quite sure he did.

Q. Did he ever get another one?

A. I don't know.

Q. Do you recall whether or not you yourself mailed the smaller cut to him later on?

A. No, sir, I don't recall.

Q. Do you recall whether your advertising man mailed the smaller cut?

A. I don't know if he did or not.

Q. Now, was it at that time that Mr. Lysfjord showed you a rough sketch of what he wanted printed on his stationery? Didn't he show you a sketch that day?

A. He may have, I don't recall if he did or not.

Q. And you don't recall, or do you recall whether or not both the Los Angeles and San Bernardino addresses were on that sketch?

A. If he did show me the literature he proposed printing, I am sure there was no Los Angeles on it. [920]

Q. All right. Let's get on to this Owens Roofing Company job. I want to ask you a question or two more about that.

(Testimony of Robert Eugene Ragland.)

As I recall your testimony, you stated that Mr. Anderson was in there and that after these conversations Lysfjord said he would like to do that job. You, Anderson and Lysfjord went over to the Owens Roofing Company then, did you?

A. Yes, sir.

Q. Was Mr. Waldron there? A. No, sir.

Q. Just the three of you then?

A. Just the three of us.

Q. You went over there and talked to one of the McLanes of the roofing company?

A. I believe that is who we talked to.

Q. You recommended Lysfjord then, I take it. Lysfjord and Waldron to do the job? That was your testimony, wasn't it? A. Yes, sir.

Q. Did Lysfjord take any figures? Did he give any estimate that day as to what the job would cost?

A. I don't know if he did or not.

Q. Well now, I am going to show you Plaintiffs' Exhibit 4, and ask you if you have ever seen that stationery on which [921] the Owens job purports to have been figured.

Did you ever see that stationery or stationery similar to that of the aabeta co.?

A. No, sir, I have never seen that.

Q. Well, you have seen a card—you note there is a card there, too?

A. That is similar to the one attached there.

Q. That is identical, is it not? Will you examine the two?

Mr. Ackerson: They are identical, except for the

(Testimony of Robert Eugene Ragland.)

long-hand pencil marks on there, which we can say is not part of the exhibit, Mr. Black?

Mr. Black: Oh, yes.

The Witness: That is right.

Q. (By Mr. Ackerson): They are identical, aren't they? A. Yes, sir.

Q. You note they list both San Bernardino and Los Angeles telephone numbers?

A. Yes, sir.

Q. You have never seen that stationery before?

A. No, sir, I have never seen that.

Q. Did you ever see any other different type of stationery of the aabeta co., a calling card of Lysfjord that was different than this, a business card? A. No, sir. [922]

Q. That is the only one you ever saw?

A. Yes, sir.

Q. Now, you do note on this stationery that it reads "aabeta co., Acoustical Tile Contractors," and it bears the same little seal as the calling card?

A. Yes.

Q. Except it isn't in two colors, is it?

A. That is correct.

Q. Then you note it reads, "901 Waterman Avenue, San Bernardino, California," with a San Bernardino telephone number.

"7302 South Atlantic Avenue, Los Angeles 4, California LOgan 0800"? A. Yes, sir.

Q. That LOgan 0800 was the telephone number you called, wasn't it, when you went out and you

(Testimony of Robert Eugene Ragland.)

say you went out to investigate these so-called rumors? A. Yes, sir.

Q. Did Mr. Harkins give you that number or did you just call the telephone company?

A. No, that number was given to me.

Q. By whom? A. I don't recall.

Q. Are you positive you didn't have the card attached to that in your pocket at that time and get it from that card? [923]

A. I have never had one of their cards.

Q. Mr. Lysfjord or Mr. Waldron never did give you any of these calling cards for the purpose of directing customers to them, or otherwise?

A. No, sir.

Q. Well, anyway, to complete that story, you did not call them up and make an appointment with them at this Atlantic Avenue address?

A. Yes, sir, I did.

Q. You got out there and you told them you were investigating these rumors? A. I did.

Q. Then, I believe you stated you spent about a week running everything down over in the Valley and Downer—

A. Yes, sir, I spent the better part of that week.

Q. Your testimony, I believe, says a week, but we won't quarrel about that.

Now, you recall testifying in a deposition, sworn testimony in my office, on October 23, 1954?

A. Yes, sir, I recall.

Q. I am going to read you, beginning with the

(Testimony of Robert Eugene Ragland.)

last line on page 32, where I asked you this question:

“Q. Well, now, you have stated that you told us about these rumors that the plaintiffs were engaging in business in the Los Angeles area. [924] What happened then, why were you told that by Mr. Harkins?

“A. He wanted to know if they were true and he told me very definitely to get out and cover the ground, if they were doing business at the Van Nuys Hospital go out and see if they actually do have a contract and if they have got a market over in Hawthorne or Torrance, go out and see if they have got it.

“Q. Did you do that?

“A. Go out and see if they have an office in Bell, which I did.

“Q. Did he tell you where the office was?

“A. No, sir.

“Q. How did you find it?

“A. Knocking on doors. They told me it was a general location around Torrance and Atlantic—around Florence and Atlantic.

“Q. That was after they were actually performing contracts and getting them here?

“A. They had three specific contracts, as I recall.

“Q. It was after they had received the first shipment of acoustical tile; is that right?

“A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

“Q. Prior to that time you had never been in the Bell plant? [925]

“A. No, sir.”

Do you recall giving that testimony?

A. I recall it. [926]

Q. Do you recall now having knocked on doors to find it or did you telephone?

A. I telephoned.

Q. Now in that same deposition, Mr. Ragland, you stated as follows, beginning on line 25, page 36, with respect to the Owens Roofing job:

“Q. Now, did you ever hear of the Owens Roofing Company job at 726 Mateo Street, in Los Angeles?

“A. Yes, sir.

“Q. Did you call that job to the plaintiffs’ attention?

“A. That was called to their attention in our office quite by accident.

“Q. Were they told to get the job?

“A. No, sir, not directly.

“Q. Did you tell them to go get the job?

“A. No, sir.

“Q. Did you know that they did perform the job?

“A. I was aware of that fact, yes, sir.

“Q. Were you aware they got the contract before they performed it?

“A. No, sir. That was to be a material only sale, Owens Roofing Company were to do that [927] job themselves.

(Testimony of Robert Eugene Ragland.)

“Q. But you did not refer it to these plaintiffs?”

“A. I was probably instrumental in their knowing about the job, yes, sir.”

Then again we get off to another subject, but on line 12, page 38:

“Q. You spoke a moment ago about this one contract they got, the last one I mentioned, the Owens Roofing Company job.

“A. Yes.

“Q. You stated that it was supposed to have been a material sales?”

“A. Yes, sir.

“Q. What did you mean by that?”

“A. Well, Owens Roofing Company, as I understand it, is a roofing account of ours or handled Flintkote materials and are serviced by our salesman Andy Anderson, and they told Andy they'd like to have an acoustical ceiling in their offices, 'you make acoustical tile, we will put it in ourselves,' so Andy came in that particular time and we had right outside of Mr. Thompson's office a big community desk. The sales personnel there, the outside salesmen, being not in the office constantly [928] they share this one big desk, and I happened to be sitting there with Lysfjord at the time that Andy came in and told that story.

“Q. Did Mr. Lysfjord hear Anderson request——

“A. I am sure he did.

“Q. ——Owens' request to buy this tile from Flintkote?

(Testimony of Robert Eugene Ragland.)

“A. I’m sure he did.

“Q. Well, what did he tell him, what happened?

“A. Baymiller was in on it and suggested calling Dick Howard, which was done. I didn’t do it personally.

“Q. Did you hear it done? Did you hear Thompson or Baymiller do it?

“A. No, sir, I didn’t.

“Q. All right. In any event, they were going to apply it themselves, the Owens Company, that is your understanding and statement?

“A. Yes, sir.

“Q. When did you first find out that Lysfjord and Waldron applied it and sold it?

“A. Lysfjord asked about that job. He said, ‘We are not quite set up yet to do business but we would like it. I think I’ll go down there.’ [929]

“Q. What did you tell him?

“A. I don’t recall what I did tell him.

“Q. Didn’t you tell him, ‘You cannot do that; that is Los Angeles’?

“A. No, sir, I didn’t.”

Do you recall that conversation?

A. Yes, sir, I recall it.

Q. Did you have in mind at that time that you personally took Lysfjord down there and recommended him for the job or did that occur to you just yesterday?

A. No, sir, I recall that very definitely. The three of us were down there.

(Testimony of Robert Eugene Ragland.)

Q. That was your testimony at that time in September?

A. Yes, sir. I see no contradiction in that.

The Court: The question is, is that your testimony.

The Witness: Yes, sir.

The Court: The jury will have to determine whether there is any contradiction.

Q. (By Mr. Ackerson): Now I showed you the other day a plaintiffs' exhibit for identification, Mr. Ragland, or was that a letter from the Owens Roofing Company, dated in 1954. Do you recall that?

A. Yes, sir.

Q. And you said you had seen that letter? [930]

A. Yes, sir, I had.

Q. Now after this deposition and after you had so testified on this Owens Roofing job, did you go down to see the McLanes? A. No.

Q. You did not? A. No, sir.

Q. How did you happen to see the letter?

A. Mr. Anderson brought a copy into the office and showed it to us.

Q. How did he happen to do that?

A. I certainly don't know the circumstances under which he happened to get the letter, but I believe Mr. McLane offered it to him.

Q. But in this testimony in your deposition you did not mean to say, did you, that you did recommend the aabeta company for that job?

A. I recommended that they do the labor on it, yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. But you did not mean to represent at that time, the deposition time, that you took them down there and assisted them in getting the job, did you? A. I certainly was instrumental.

Q. Now you testified yesterday also that you had a conversation with Lysfjord and that you recommended Phoenix [931] and Lysfjord said something that he would take a trip down there and he came back later and told you he had taken the trip?

A. Yes, sir.

Q. But he didn't care much about it?

Now do you recall being questioned on that point in this same deposition, Mr. Ragland?

A. I don't recall that.

Q. Well, we were talking about these conferences between you and Mr. Lysfjord.

This is beginning on page 5, line 21, Mr. Black.

“Q. When did you first contact either Mr. Lysfjord or Mr. Waldron with respect to their obtaining a supply of Flintkote acoustical tile?

“A. I believe they contacted me, possibly. I can't be too exact on that. Say June of 1951.”

That was at the time you became promotional chief of acoustical tile, is that right?

A. That is correct.

Q. Continuing:

“Q. At least your recollection tells you that it was some months after you became an acoustical representative; is that right?

“A. That's right.”

(Testimony of Robert Eugene Ragland.)

As a matter of correction, it was about the [932] time?

A. We used the word "approximately" in there.

Q. All right.

"Q. What was the nature of that contact; can you just relate what happened?

"A. More on a friendship basis. 'We know that you're with Flintkote; they make a good acoustical tile; how about it, can we have some of it? I think we'd like to get into the business and who do we see, how do we go about seeing the right people?'

"Q. Did you tell them?

"A. At that time I told them that we had adequate representation locally; 'why don't you go over to Phoenix, boy? I need somebody badly in Phoenix, or in, say, Albuquerque or possibly Denver, some place else?'"

Now is that the only time that you had a private conversation between just the two of you about this Phoenix proposition?

A. Between just the two of us? [933]

Q. Yes. A. I don't recall.

Q. You don't recall any others?

A. No, sir.

Q. Then I go on with the next question:

"Q. Well, what did they say to that?

"A. Well, it was sort of a neutral acceptance. I mean, there's neither yes or no, more or less, "We'd like to stay. We're in the market. We don't want to go to Phoenix.'"

(Testimony of Robert Eugene Ragland.)

Do you recall that as Lysfjord's reply?

A. That is the general nature of his statement.

Q. And that was your testimony in October of last year? A. Yes, sir.

Q. Now, you have testified to this first Supper Club meeting, and you will recall your testimony on that, I am sure, from yesterday afternoon.

“Well, did you talk with Mr. Baymiller about it before Mr. Lysfjord——”

Mr. Black: May I have the page, please?

Mr. Ackerson: Yes. It is 11, line 3. Pardon me, Mr. Black.

“Q. Well, did you talk with Mr. Baymiller about it before Mr. Lysfjord arrived on the scene?”

“A. Surely. [934]”

“Q. What did you tell him?”

“A. I explained their background on a friendship basis with Lysfjord and Waldron; I expressed my confidence in their ability and thought that it would be worth his time and Flintkote's time to give them the consideration of an appointment that they wished at that time.”

Then you go on and state—or——

“Q. In other words, you recommended them as contractors?”

“A. Yes.

“Q. Where did you have this lunch?”

“A. The Manhattan Supper Club on—I don't recall. It's 37th——”

And the three of you attended. That last sentence was not quoted. A. Surely.

(Testimony of Robert Eugene Ragland.)

Q. That was the first meeting then, was it not?

A. Yes, sir.

Q. Well, then I asked you a question at the last line on page 11. I asked you what transpired and I asked you—you stated the general terms of discussion, and then I asked you this question:

“Q. Well, what, if anything, did Mr. Lysfjord have to say on that occasion? [935]

“A. I am quite sure Mr. Baymiller stated that we were adequately represented in the Los Angeles metropolitan area and that possibly if they would consider opening an office, say, in San Bernardino or Riverside Counties, we might be able to induce our management to go along with a setup like that.

“Q. Well, now, to refresh your recollection, isn't it a fact Mr. Baymiller told Lysfjord at that time that if he would also take San Bernardino where you were not represented that it would help him to get the line of tile here; isn't that the actual statement of Baymiller?

“A. I don't recall.”

Do you recall giving that testimony?

A. Yes, sir.

Mr. Black: The entire answer wasn't quite read. It changes the accent quite a bit.

Mr. Ackerson: I kept on asking questions and he finally remembered, but he didn't remember at first. You can bring in the first——

Mr. Black: The answer was not completely read. “I don't recall that,” he said.

Mr. Ackerson: I beg your pardon.

(Testimony of Robert Eugene Ragland.)

Mr. Black: It changes the accent quite a bit.

Mr. Ackerson: "I don't recall that." Thank you, Mr. [936] Black. I didn't mean to leave out a word.

Q. (By Mr. Ackerson): Now, you likewise testified regarding the Harkins meeting.

As I recall your cross-examination and possibly the direct the previous two days, you said these two people came down here, Thompson, Baymiller came out and greeted them, and the two of us either—was it you and Baymiller, you say, that took them in to meet Harkins, both of you?

A. I believe it was Mr. Thompson and I.

Q. The two of you went in there. I wanted to be fair. I reread your testimony and I can't find where you definitely answered whether or not one or both of you. That is, either you or Thompson remained in there during the time, entire time that Mr. Lysfjord and Mr. Waldron were in Harkins' office?

A. Well, that point isn't clear in my mind, either. I could have and I couldn't have; I don't recall.

Q. But then you testified that after you came out of Harkins' office—and correct me if I am wrong—then you took these people over to McAdow?

A. Yes, sir.

Q. And gave them the statement?

A. Yes, sir.

Q. Do you think that is the way it happened?

A. I am quite sure that is the way it happened.

(Testimony of Robert Eugene Ragland.)

Q. Was your memory any clearer yesterday than it was [937] when you had this deposition taken? A. Not a bit, sir.

Q. Well, I believe in this deposition you had it more or less reversed, and I would like to read it to you and see if it refreshes your recollection.

And I think you also stated that they were not told that they were Flintkote dealers, or they were not authorized until after they had talked to Mr. Harkins. Is that your testimony? Am I incorrect on that?

A. Was that my testimony yesterday?

Q. That is my recollection of it, Mr. Ragland. I could be wrong.

A. Well, I could also be wrong. I think we had every expectation to believe they were before, but actually Mr. Harkins had the final word.

Q. Yes. Then actually you don't know whether when Thompson came out and greeted them and congratulated them as dealers, or you don't recall whether you did?

A. No, sir, I don't think Mr. Thompson or myself ever have used that statement.

Q. But you could have?

A. We could have, yes.

Q. You were certain they were going to be dealers because you were taking them in to make it official with Harkins. [938]

A. As I said, we had every expectation.

Q. There is one other little thing here that may refresh your recollection a little.

(Testimony of Robert Eugene Ragland.)

This is with respect to your going in the office of Mr. Harkins.

“Q. Very well. We have got through the introduction to Mr. McAdow.”

As I stated, in your previous deposition you stated you introduced them to McAdow first, rather than afterwards. But let's not quarrel about that. It could have been either, couldn't it?

A. It was after.

Q. Well, you were wrong in your deposition then, is that—

A. I can't ask questions, I can just answer them.

The Court: If you don't understand a question you can ask to have it clarified so you are answering something you understand. You can't argue or ask him about things that might modify a situation.

Q. (By Mr. Ackerson): Let me read your testimony in that regard and you can change it now if you want to.

“Q. All right. Now tell us about that.”

I am asking about the meeting, when they came to see Harkins.

“A. They came in and had their financial statement and [939] Mr. Thompson and Mr. Baymiller and myself met them, and we exchanged greetings. The secretary said that Mr. Harkins was free, would we please go in and we—

“Q. Right there, was it arranged that Mr. Lysfjord and Mr. Waldron would get this line of Flintkote acoustical tile before you went in to Harkins'?

“A. Yes, sir. I believe that was the general con-

(Testimony of Robert Eugene Ragland.)

sensus of opinion.

“Q. In other words, these two plaintiffs met you, Mr. Thompson and Mr. Baymiller and one of the three of you told them they were in; is that right? A. Yes, that’s right.”

And then you repeat.

“Q. Then, as you recall it, you took them out and introduced them to another gentleman, your accountant?”

“A. Yes, sir. Mr. McAdow. He’s our credit department manager.

“Q. What did you state to Mr. McAdow in connection with this introduction?”

“A. I stated they were good friends of mine; we were going to set them up as acoustical applicators [940] handling our material in San Bernardino.”

And then I said—

Mr. Ackerson: This is line 20, page 22, Mr. Black:

Q. (By Mr. Ackerson): “Q. Very well. We have got through the introduction to Mr. McAdow. Then, what happened?”

“A. Mr. Harkins shook hands, I recall, and pleasantries were expressed and I think we took them over to our advertising and sample department and showed them what was available to them. I don’t recall exactly if they had an order ready to place that day or not.

“Q. Were you there during the entire period that these two gentlemen, the plaintiffs, were in the presence of Mr. Harkins?”

(Testimony of Robert Eugene Ragland.)

“A. No, sir, I believe I took either one of them over to McAdow while the Harkins conversation was still going on.

“Q. In other words, they were talking to Mr. Harkins when you were not present on this occasion; is that right?

“A. That could very easily be.

“Q. Is that your recollection?

“A. That’s my recollection.”

Can you state now, after hearing your prior testimony, [941] whether or not you do recall that you did leave the office after introducing them to Mr. Harkins?

A. I don’t think I want to change anything I have said. I will let that stand. [942]

Q. In other words, you still say you just don’t know, is that the ultimate effect of it?

A. Yes, sir.

Q. Now I asked you whether or not you felt you were in Harkins’ office during the entire period, whether or not you heard Mr. Harkins refer to a Ryan Aircraft job, and your answer was no.

A. That is right.

Q. Now I have refreshed my recollection since last night. Instead of the Ryan Aircraft job I meant to say the Convair Aircraft job over at Pomona. You have heard of that job, have you not?

A. Convair Aircraft, yes, sir.

Q. And you do know that Flintkote sold a tremendous amount, or that a large amount of Flint-

(Testimony of Robert Eugene Ragland.)

kote roofing was used on that job? You know that, don't you?

A. I know it by hearsay, yes.

Q. It was an extremely large order?

A. Yes, sir.

Q. But you stated that you did not hear Mr. Harkins mention this order to the plaintiffs?

A. That is correct.

Q. And you did not hear Mr. Harkins suggest that there was acoustical tile in the job, that they could go after that? A. No, sir. [943]

Q. Then your answer of "No," no knowledge of this Ryan job, was that what you meant or did you say you had no knowledge—in other words, it was based on my misuse of the term, is that right?

A. I know Ryan Aircraft is in San Diego.

Q. But you do know of this Convair job, though?

A. Yes.

Q. Now you stated, I believe, that when you came back from this Seattle-San Francisco trip that Mr. Harkins, was it, called you in and said that there are rumors that these people are doing business here?

A. The first man I met was Mr. Baymiller.

Q. And he told you that?

A. He gave me that, in essence, yes, sir.

Q. And then did you go from Mr. Baymiller to Mr. Harkins' office that day?

A. No, sir, Mr. Lewis saw me after Mr. Baymiller and he reiterated approximately what Mr. Baymiller had told me.

(Testimony of Robert Eugene Ragland.)

Q. Well, now, Mr. Baymiller, did he say from whence these rumors came?

A. I don't recall.

Q. Didn't he actually tell you that Krause, Hoppe, Newport, said that?

A. He possibly did tell me that.

Q. And did Mr. Thompson tell you the same thing practically [944] as to where they came from?

A. No, sir, I didn't talk to Mr. Thompson that morning.

Q. Did you talk with Mr. Harkins before you went out on this alleged investigation?

A. Yes, sir.

Q. Was that the same day?

A. Yes, it was.

Q. And did Mr. Harkins tell you about Hoppe, Krause, and Newport reporting this?

A. I don't recall him using any names.

Q. By the way, Mr. Ragland, you do know that Mr. Newport and Mr. Harkins had some personal social relationship aside from a business relationship, didn't you?

A. No, I have no personal knowledge of that. Just hearsay.

Q. But you understand that?

A. That was my understanding, yes, sir.

Q. Were they neighbors?

A. I guess they both lived in San Gabriel at one time.

Q. Well, now, when you got through talking with Mr. Harkins, did you immediately go out to this

(Testimony of Robert Eugene Ragland.)

Atlantic Avenue address, phone for an appointment and immediately go out there the same day?

A. It seems to me like I did. I arrived at the Bell office before noon. [945]

Q. That was your first round on this investigation, wasn't it?

A. I am quite sure it was, yes, sir.

Q. Then you asked them about these jobs? You said there were three jobs that you were interested in?

A. Yes, sir.

Q. Did you ask them about it?

A. Yes, sir.

Q. Did they tell you yes, they had them?

A. Yes, they told me they had them.

Q. And did you ask them the rest of these questions that are contained in this report of yours? I mean about a credit question from Simpson Company, and so forth, did you ask them about that?

A. Credit from the Stanton Company.

Q. Stanton. I beg your pardon. Did you ask them about that.

A. I believe I did.

Q. And they explained it to you, didn't they, that it was a mistake, that it was an error on the part of the bank or authorization of Yeoman's to sign a check, or something like that?

A. I believe in essence that is one of the things. I don't know if that was clarified right at that time or shortly thereafter. [946]

Q. Well, now, there was another item in this report. You said something there that Mr. Lysfjord or Mr. Waldron had been accused apparently, at

(Testimony of Robert Eugene Ragland.)

least that was one of the rumors you purported to investigate and report on, that they had been accused by someone about stealing papers from the Downer Company files, and I believe they were referring to the take-off cards. Do you recall asking anything about that from Lysfjord or Waldron on that day?

A. I believe I did.

Q. Now where did that rumor come from, the same sources?

A. Just one of the many, the same source.

Q. There were many sources?

A. The same general source.

Q. And you found that that wasn't so, too, didn't you?

A. I asked them if they had taken files with them, job files, and naturally they said no.

Q. And you as a former salesman knew that these unsuccessful take-off sheets were not filed with the company or kept for posterity in any event, they were really the salesman's property to do with as he wished after the job was lost? You knew that as a salesman, didn't you?

A. It never has been the policy of anyone I ever worked for.

Q. You mean it wasn't the policy with the Shugart [947] Company? A. No, sir.

Q. How long did you sell for Shugart?

A. Close to three years.

Q. And you bid 15 times on a public job?

A. Yes, sir.

Q. Or about that? A. About that.

(Testimony of Robert Eugene Ragland.)

Q. And did Shugart make you always come back with the unsuccessful bid or take-off sheet?

A. Every record I ever had was their property.

Q. But you determined at least and reported to Harkins that that wasn't so, that these people did not steal anything in retaining these take-off cards, didn't you?

A. They told me they hadn't so I accepted that.

Q. Now there is another reference to something in there that I don't quite understand, and I would like you to tell me what you know about it because it may come up in this case.

It is No. 4, the fourth piece of information or answer you purport to give to Mr. Harkins, "that the aabeta company has not sold to Louis Downer Company of Riverside any Flintkote tile to be installed in the Orange Coast College job."

Now Louis Downer was not a Flintkote dealer, was he? A. No, sir. [948]

Q. You recall that Lou Downer tried to get Flintkote tile up in San Bernardino and was informed by your company to get it from aabeta co.? Do you have any knowledge of that?

There is an exhibit in evidence here to that effect. I won't find it if—

A. I imagine that is true, yes.

Q. Yes. Now, where was this Orange Coast job?

A. The Orange Coast College is in Costa Mesa, just in back of Balboa.

Q. How did that come to your attention? Why

(Testimony of Robert Eugene Ragland.)

were you interested in that? What did Mr. Harkins want you to find out about that for?

A. It was one of the many rumors that were going around, that it seems like the Louis Downer Company had bid on a job with which he had no material to meet the specifications.

Q. But you had told, at least, your company had told Waldron and Lysfjord they could sell Louie Downer tile. Invited Louie Downer to buy it from them. So I still don't understand why Mr. Harkins was interested in that Orange Coast job.

A. I don't, either.

Q. Wasn't it because the same contractors had objected to him competing in this area, too?

A. To Louis Downer?

Q. Yes. Isn't that what you were told? [949]

A. I am not sure of the date, but I believe he was connected with his father's company in Los Angeles at that time.

Q. But that is the only—you can't give me any explanation as to why you should be asked about that?

A. There was a rumor that aabeta was selling Louis Downer material for work in Los Angeles.

Q. And that was objected to, was it?

A. It seems like it was, yes, sir.

Q. But you don't know who objected to it, unless it was these same people?

A. Not specifically. Just aggregately, it was the same objection.

Q. The contractors objected to it? That is right?

(Testimony of Robert Eugene Ragland.)

A. Surely.

Q. Do you recall, Mr. Ragland, that after this, or along about the same time, you had arranged to sell a lumber company in Bakersfield, tile for that job, too?

A. No, sir, I don't recall any lumber company at Bakersfield. I recall a Forest Lumber Company in Lancaster.

Q. The McNaul Company in Bakersfield. Do you remember you made arrangements to sell them tile for this same Orange Coast job?

A. No, sir.

Q. And do you remember that that order was stopped, [950] too.

A. I don't recall it.

Q. They refused to deliver that order that was in your line at that time, then you would know that a substantial order of tile was stopped, wouldn't you? A. Yes.

Q. Don't you recall that order was stopped because it was going on the Orange Coast school job?

A. Had Flintkote accepted it? I don't know.

Q. You know it was never delivered by Flintkote after talking about it or selling it?

A. I would have to check their records, to find out about that.

Q. You have no recollection on that.

A. No.

Q. I want to ask you one more question on this report. I would like you to think about it, Mr. Ragland.

(Testimony of Robert Eugene Ragland.)

You have this report dated February 15, 1952?

A. Yes, sir.

Q. Was that the actual date you had it typed up?

A. I am sure it is. I certainly haven't made two reports.

Q. Would you state, as a witness, that it wasn't typed up after July 2, 1952—after July 21, 1952?

A. I will state yes, sir. [951]

Q. In other words, you say it was before that?

A. I will state that it is the same date that is on the paper.

Q. Well, you stated you went down after talking with Mr. Harkins about these rumors, that you went down to these two plaintiffs at the aabeta plant on Atlantic Boulevard in Bell, and you had your conversations with them and you asked them about these prices.

Then what did you do? You went back to the—did you go back and report orally to——

A. No, sir, I don't believe I did go back and report orally to Mr. Harkins any time that week. I went on to the next order of business; as to my way of thinking I checked the North Juanita Street rumor, that they had an office next to the C. F. Bolster Company.

Q. You made all these checks you mentioned yesterday, is that it, after you left this office?

A. Yes, sir.

Q. Now, I am going to call your attention to your testimony in this deposition of October, 1954. We will start at page 43, line 13. I ask you:

(Testimony of Robert Eugene Ragland.)

“Q. Now, I do not want to interrupt you but let’s get it in a chronological order—get it in chronological order.”

Mr. Ackerson: Mr. Black, I am not a very good reader. [952] You correct me if I leave out any word or change a word it isn’t intentional.

Mr. Black: If it is unimportant, I won’t.

Mr. Ackerson: I do once in a while, even though I try not to. I continue:

“Q. Now, I do not want to interrupt you but let’s get it in chronological order. You say you ran down these leads. Did you go out and see them at their Bell plant? A. Yes, sir.

“Q. That was before the three of you went out, I take it?”

And you understand I am referring to the termination meeting them?

A. I think I did, yes, sir.

Q. And you answered “Yes, sir.”

And then I asked:

“Q. Who did you see at the Bell plant?

“A. I saw Mr. Lysfjord first and I believe Mr. Yeomans was there, if I’m not mistaken.

“Q. What did you tell them? What occurred on that occasion?

“A. Well, I expressed my amazement that the place was there, frankly.

“Q. Did you tell them that you were amazed they [953] had a plant out there?

“A. I did, I told them they had to my knowledge

(Testimony of Robert Eugene Ragland.)

—what I had heard, they had been taking jobs in Los Angeles, and we didn't agree to that.

“Q. Did you tell them to stop it?”

“A. No, sir, I don't believe I told them to go ahead or back up or anything. I told them it wasn't the right thing to do and they understood that and they stated—I believe Mr. Waldron came in about that time, possibly after I had been there a half hour, 35 minutes, he came by and I told them that I had to go out and run down the other rumors that I had heard and that it was not right. Mr. Lysfjord said, “Well, do you think if we go out back to San Bernardino everything will be all right?”

“I said, I didn't know.

“Q. You said you had to run down other rumors. Didn't you just ask them if they had taken any other jobs or what jobs they had taken here?”

“A. Possibly I did ask them if they had the contract on the Valley Community Hospital in Van Nuys.

“Q. You asked them whether they did?”

“A. Yes.

“Q. What did they say?”

“A. He said they had. [954]

“Q. Did you go down the other contracts and make inquiry?”

“A. Three of them, yes, sir, that I had rumors of.

“Q. Well, then, you made your investigation, if you made it, at the plant there, didn't you?”

“A. Yes, sir.

“Q. I take it, then, you went back to Flintkote,

(Testimony of Robert Eugene Ragland.)

didn't you? A. Yes, sir.

“Q. What did you do when you got back there?”

And then your answer:

“A. Mr. Thompson, Mr. Baymiller were called, along with me, into Mr. Harkins' office and I reiterated the facts as I had found them and Mr. Harkins said that they have broken a gentlemen's agreement with us; that Mr. Thompson and Mr. Baymiller should go out and tell them that we are terminating our agreement with them.”

Do you recall that testimony?

A. Yes, sir.

Q. Does that refresh your recollection as to whether you are now correct, or it is now your opinion you did anything more than go out and talk to these gentlemen and come and terminate? [955]

A. That, in essence, is correct. I don't want to change any of my testimony. You have lumped together a time element there that spans over a [956] week.

Q. Well; I didn't lump it, I just read the testimony. You say that is correct. You did give the testimony? A. I gave that testimony, yes, sir.

Q. Now when Mr. Harkins first called you into the office about these so-called rumors, Mr. Ragland, you had been up in Seattle, you stated?

A. That is correct.

Q. And I take it by that that he must have waited until you got back to have you make this investigation? A. Yes, sir.

Q. Did he ever explain or state to you why he didn't just pick up the telephone and ask these gen-

(Testimony of Robert Eugene Ragland.)

lemen themselves? They didn't deny anything when you got out there. Why didn't he do that as the big boss of the 11 Western states?

A. I don't know.

Q. Didn't he ever tell you?

A. He never did tell me.

Q. When you were sent out there you and Baymiller and Thompson, you say Mr. Harkins said they violated the gentleman's agreement, go out and terminate them, was there anything said about why he just didn't sit down and write a letter and say, we won't sell you for such-and-such a reason? I mean was there any explanation of why he sent all three of you clear out to Bell, or over to Bell?

A. There is possibly an explanation why he sent me [957] first because I was dealing with the plaintiffs.

Q. But did he give you any explanation as to why he wanted all three of you to go out there and deliver this Message to Garcia?

A. Well, I imagine for——

Q. Did he say anything?

A. He didn't tell me why.

Q. No explanation whatever?

A. Not to me.

Q. Now Mr. Thompson wasn't even an acoustical tile man down there, was he? Mr. Thompson's field was the roofing field, wasn't it?

A. He also has acoustical tile in his department.

Q. Does he? A. Yes, sir.

(Testimony of Robert Eugene Ragland.)

Q. At that time did he? A. Yes, sir.

Q. But he is basically in the roofing field, isn't he? You were basically an acoustical tile man.

A. I worked for Mr. Thompson and whatever I sold was credited to his department.

Q. Now, Mr. Ragland, up to this time, that is, up to the time of the termination on February 19—we have about decided that is the date—of 1952, I think you stated your three Flintkote outlets here in Los Angeles County at that time [958] was Sound Control, Howard and Coast, wasn't it?

A. That is correct.

Q. Was there any limitations whatever on their activity, that is, geographically?

A. None that I know of outside of normal competitive limitations.

Q. They could and did establish jobs in Riverside or San Bernardino if they wanted to, couldn't they? A. Yes, sir, they did.

Q. And I believe they did at times?

A. Yes, sir.

Q. And they could go up to Santa Barbara or they could go down to Long Beach or they could go to Pomona? A. Yes, sir.

Q. They could do this Convair job or any other job they wanted to, couldn't they?

A. Yes, sir.

Q. There was no limitation whatever?

A. That is right.

Q. And did you answer that prior question of

(Testimony of Robert Eugene Ragland.)

mine as to how this letter from the Owens Roofing came to your attention after your deposition?

A. Mr. Anderson showed it to me in the Flintkote office.

Q. And yet you can't tell me how Mr. Anderson got it, or why he got it? [959]

A. No, sir, I don't know how he got it.

Q. Isn't it true that after your deposition The Flintkote Company investigated to see what McLane was going to say about it, isn't that the reason you got the letter, when you went down to ask him, didn't he say, well, I have already written a letter?

A. No, sir.

Q. Did you go down yourself?

A. The only time I have been in the Owens Roofing Company offices was when I took Mr. Lysfjord in there.

Q. Do you know whether or not Anderson was sent down there to get that letter and talk to the McLanes to see what they would say about your contacts in connection with that job?

A. No, sir, I don't have any knowledge that he was sent down there.

Q. But in any event Anderson came back and showed you the letter they had written to the aabeta company about your contacts about that job?

A. Yes, sir, he showed it to me.

Mr. Ackerson: I believe that is all, Mr. Black.

Mr. Black: I have no redirect examination. Does the court wish to call the next witness or shall we take a recess?

The Court: We will take a recess before we go on with the next witness.

(Short recess.) [960]

Mr. Black: We shall call Mr. Baymiller, if the court please.

BROWNING BAYMILLER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: You full name, sir?

The Witness: Browning Baymiller.

The Clerk: Will you spell the last name?

The Witness: B-a-y-m-i-l-l-e-r. That is one word.

Direct Examination

By Mr. Black:

Q. Your present occupation, Mr. Baymiller?

A. I am assistant sales manager of the Southwest Division of the Pioneer Division of The Flintkote Company.

Q. How long have you held that position?

A. Since about May of 1950.

Q. Have you held it continuously from that time to the present? A. Yes, sir.

Q. What, in general, do your duties consist of in that capacity?

A. My duties consist of directional and guidance of our group of outside salesmen that are stationed

(Testimony of Browning Baymiller.)

at strategic points throughout the territory that we serve. [961]

Q. What commodities made by your company are dealt with by you in that department?

A. All building materials that we handle with the exception of floor tile. By all of the building materials I mean acoustical tile, fiberboard tile, roofing, asphalt and various types of coatings.

Q. Who is your immediate superior in that position? A. Mr. E. F. Thompson.

Q. Was he your superior in the summer of '51 through the spring of '52?

A. Yes, sir.

Q. When and how did you first learn of Messrs. Lysfjord and Waldron?

A. My first knowledge of Mr. Lysfjord was, I would say, in the early or middle '51 when he was mentioned to me at sundry times by our promotional salesman, Mr. Ragland.

Q. What in general was told to you about him or them?

A. That he had been associated with Mr. Ragland, being employed by the same company at a previous date, and they both had left that company and Mr. Lysfjord was now working for another firm of the same nature, and that he was interested in leaving that firm and going into the acoustical tile application business.

Q. What, if anything, did you say to Mr. Ragland in response to this information? [962]

(Testimony of Browning Baymiller.)

A. I informed Mr. Ragland that at that particular time we had no opening.

Mr. Ackerson: Just a moment. I am going to object to this as hearsay, your Honor.

The Court: It is difficult for me to determine whether it is hearsay. This man is testifying to a conversation he had with one of the plaintiffs.

Mr. Ackerson: Yes.

The Court: What makes that hearsay?

Mr. Ackerson: There is certainly no way to rebut it.

The Court: If it did not occur, your client could come up here and tell us so.

Whatever it might be, it isn't hearsay. The objection is overruled. [963]

Q. (By Mr. Black): Did Mr. Ragland continue to approach you with respect to possible opening for the plaintiffs in your department?

A. Yes, Mr. Ragland at various times requested a hearing with Mr. Lysfjord, with me.

The Court: I might have misunderstood. I thought he was talking about one of the plaintiffs.

Mr. Ackerson: No, your Honor. This is a conversation between two of the defendants—or, I mean two of the employees of Flintkote Company. I don't know, they may have talked about anything. I think it is all hearsay.

The Court: I misunderstood—

Mr. Black: It is all preliminary.

The Court: I misunderstood. It is hearsay.

Mr. Ackerson: I thought your Honor did.

(Testimony of Browning Baymiller.)

Mr. Black: It is a statement of what the witness did in the course of his business in connection with initial contact. It is not offered to prove the truth or falsity of the statements made, as respects to third parties. It is simply a recital of what he did in pursuance of his duties.

The Court: To show this witness' actions?

Mr. Black: It is merely preliminary. We are leading up to the first conversation.

The Court: All right. Go ahead.

Q. (By Mr. Black): Did Mr. Ragland continue to attempt [964] to interest you in the desire of the plaintiffs to go into business for themselves, in connection with Flintkote products? A. Yes, sir.

Q. What developed from those continued approaches?

A. As a courtesy to the plaintiffs and to Mr. Ragland, who was a promotional man, I conceded to give Mr. Lysfjord a hearing, and see what he had to offer.

Q. And did you have such a hearing?

A. Yes, sir.

Q. When did that take place?

A. I would say sometime in the early fall of 1951.

Q. And where?

A. Manhattan Supper Club on South Western Avenue.

Q. Who was present at that time?

A. Mr. Lysfjord, Mr. Ragland and myself.

Q. Nobody else? A. No one else.

(Testimony of Browning Baymiller.)

Q. As nearly as you can recall, would you state the substance of the discussion had at that meeting?

A. The discussion was mostly, the substance of it was Mr. Lysfjord's attempts to impress upon us what a valuable asset he would be as an outlet for our acoustical tile.

Mr. Ackerson: May we have what was said, Mr. Black?

Mr. Black: Yes. I am leading to that.

Q. (By Mr. Black): State, as nearly as you can, what [965] Mr. Lysfjord said in that connection.

A. Well, it was my first meeting of Mr. Lysfjord and he expressed the desire to better himself which is something we all do. By bettering himself he anticipated——

Mr. Ackerson: I guess——

Q. (By Mr. Black): The substance of what he said. Is this the substance of what he said?

The Witness: That is right.

Mr. Ackerson: You are stating what Mr. Lysfjord said, Mr. Baymiller?

The Witness: Right.

Q. (By Mr. Black): So I understand——

The Court: Tell us what he said, instead of trying to interpret what he said. That is, don't say "He anticipated."

The Witness: Your Honor, I am unable to recall the exact words, if you will pardon it, but I will have to give the substance of it.

The Court: We don't expect you to be a miracle

(Testimony of Browning Baymiller.)

man and recall exactly. You can tell us the substance of what he said. Keep it in terms, or the substance of the terms of the conversations, instead of interpretations or conclusions, or what was meant by the conversations.

The Witness: Mr. Lysfjord's statements, or his conversations, of which he did most of the talking, was to express his desire of severing relations with his present firm and [966] going into the contracting business for himself.

Q. (By Mr. Black): What, if you recall, did you say to him with respect to any available Flintkote opportunity?

A. I told him the same thing as I had previously told Mr. Ragland, to convey to him, and that was that we had no opening for any further acoustical tile distribution in the metropolitan Los Angeles area.

Q. Was there any discussion at that meeting, if you recall, with respect to areas that were available?

A. There could have been either at that meeting or a subsequent meeting.

Q. You don't have any distinct recollection?

A. I don't have any recollection, whether it was at that meeting or a subsequent meeting when other areas were discussed.

Q. Do you recall anything else that bears on the matter of taking on this account or not taking on this account, that occurred at that meeting, that you now recall?

A. No, I don't.

(Testimony of Browning Baymiller.)

Q. Did you have any further contact with the plaintiffs or either of them personally thereafter?

A. Personal contact was, I should say, something like, oh, from ten days to two weeks later.

Q. And how did that happen to occur?

A. That occurred by a previous arrangement by Mr. [967] Ragland for Ragland to meet Mr. Thompson and I at the same spot, same place, and that Mr. Lysfjord was to be there and he was also to discuss this with my superior, Mr. Thompson.

Q. Did such a meeting take place?

A. Yes, sir.

Q. Who was present?

A. Mr. Ragland, Mr. Thompson, Mr. Lysfjord and Mr. Waldron.

Q. And yourself?

A. And myself, yes.

Q. Did all of those persons stay together throughout that meeting? A. Yes, sir. [968]

Q. Now will you relate as near as you can recall the substance of what you remember of being discussed at that meeting, again, please, trying to observe the court's admonition to put this in terms of the substance of the conversation rather than your interpretation or conclusions as to what it signifies?

A. At this particular meeting the plaintiffs—it was Mr. Waldron who brought the portfolio which contained a number of contracts that he had signed up himself personally for his present employer—these contracts were presented to us for review,

(Testimony of Browning Baymiller.)

which we looked at, and Mr. Waldron or Mr. Lysfjord, one, so stated that these were permanent customers with them and these customers would follow them wherever they went, whether they be for themselves or for another firm.

Q. Do you recall what customers were discussed at this time?

A. I recall only one of the sheets of paper there. One of them was from Hayden-Lee, an engineering firm, and another I believe was Jackson Bros.

Q. What, if anything, was said in response to this discussion with respect to these two contractors, if you remember?

A. Of course the presentation of these contracts is highly effective for the purposes that Mr. Lysfjord and Mr. Waldron were after, and in looking at them there we could not [969] see where the additional business that we could derive from their operation with these people in this local area. However, it was mentioned there that each one of these contractors, whether they be a Los Angeles firm or not, do operate in other areas.

Q. Was there any discussion that you recall with respect to the territory available at that meeting?

A. Yes, sir.

Q. What was said and who said it?

A. I am not able to say who said it. I believe that Mr. Thompson was more or less the spokesman for our group. And he mentioned the area of San Bernardino County and Riverside County,

(Testimony of Browning Baymiller.)

which is a fringe area for Southern California here, which was open for a new distribution.

Q. Was there anything said positively or negatively at that meeting about the availability of metropolitan Los Angeles? A. Yes, sir.

Q. And what was said in that connection, if you recall?

A. Mr. Thompson informed them that there was no opening at all, whatsoever, in the metropolitan area of Los Angeles.

Q. Do you recall whether there was any discussion of the possibility of following specific jobs into the Los Angeles territory one way or the other?

A. Yes, sir. [970]

Q. What was said in that connection, if you recall?

A. What was said in that was that Mr. Thompson informed the plaintiffs that in the event that they became exposed to or offered a contract in the metropolitan area by one of these so-called permanent customers of theirs, that that is an item that would be discussed at a later date and each case would be handled individually.

Q. Do you recall whether there was any discussion at that meeting as to what would be required in order to set up in business for themselves by the plaintiffs?

A. Yes, there was a discussion as to the capital required to operate such a venture, as well as a prospectus of the expected type of operation and

(Testimony of Browning Baymiller.)

the amount of business that they anticipated doing with their available capital.

Q. Do you remember whether there was anything said at that particular meeting relating to possible opposition of other contractors operating in this general area?

A. The conversation about that particular type of meeting there had been centered on area outside of Los Angeles metropolitan area.

Q. Do you recall anything said at all about objections?

A. Yes, I believe Mr. Lysfjord or Mr. Waldron, one of the two of them—I don't recall which—anticipated that we would have objections from other customers about our setting them up in San Bernardino and Riverside. [971]

Q. What, if anything, was said in response to that?

A. Mr. Thompson answered that to the effect that that particular area out there, that we reserved the right to establish a customer in that particular area without any protection at all for our present customers in Los Angeles.

Q. Do you recall whether Mr. Waldron stated at that meeting anything about the local contractors being organized? A. No, sir.

Q. Do you recall whether he made any statement, or either of the plaintiffs made any statement, at that meeting with respect to the fact that the local dealers were no competing?

A. No, sir.

(Testimony of Browning Baymiller.)

Q. Nothing of that sort was said?

A. No, sir.

Q. Was there any reference at that meeting that you remember as to the matter of the place where acoustical tile would be delivered?

A. A specific address, do you mean?

Q. The general area.

A. Yes, San Bernardino or Riverside.

Q. Was anything said about using material thus delivered in the Los Angeles area?

A. I don't understand your question, Mr. Black.

Q. Was there anything said about using material delivered [972] to the plaintiffs at Riverside or San Bernardino in the Los Angeles area to apply to jobs done here? A. Yes, sir.

Q. What, if anything, was said in that connection if you remember, and by whom?

A. Mr. Waldron asked the specific question, that in the event that we shipped them a carload of acoustical tile to Riverside or San Bernardino and they chose to haul the material back into the metropolitan Los Angeles area for use on a contract in this area, what would be our attitude toward that? [973]

Q. Do you recall any response that was made to that inquiry?

A. Yes, sir. Mr. Thompson answered that question.

Q. And in what way did he answer it?

A. Mr. Thompson's statement was that we would not condone such an arrangement, which

(Testimony of Browning Baymiller.)

would represent an absolute subterfuge of what the purpose of our agreement was.

Q. Do you recall anything else that took place at that meeting that you haven't related that bears directly on the plaintiffs' proposed operations?

A. No, I do not, other than after the meeting I got to thinking of thumbing through the list—the portfolio of contracts, and I begin to think about the type of material that they—that those contracts represented, and I would say that over 50 per cent of them was on decorative tile and not acoustical tile at all.

Q. What significance would that have with respect to the plaintiffs' operations?

A. It would have the significance, and that is, that decorative tile is not an item that is restricted to the sale of exclusive acoustical tile contractors. It is available from any acoustical—by any acoustical tile contractor or lumberyard or any qualified dealer, buyer, from many wholesales that are in the Southern California area.

Q. Do any of your acoustical tile dealers have any [974] preferential price for decorative tile?

A. No, sir.

Q. Did they at that time? A. No, sir.

Q. What items, in point of fact, were available to your dealers to whom you sold acoustical tile at a preferential price, over the general public, let's say?

A. You are speaking—available to the dealers, you mean, acoustical tile dealers?

(Testimony of Browning Baymiller.)

Q. Contractors.

A. Contractors. You want specific sizes, Mr. Black?

Q. No. No. I mean what commodities.

A. Our fibertile ranging in thickness from a half inch up to an inch and a quarter, and in size form 12 x 12 up to 24 x 48.

That was the fiber line. And our only other type of acoustical tile available at that time were metal pans.

Q. How about molding?

A. No molding. We have no moldings, other than the ones that are used in connection with metal pans.

Q. Starter strips. A. No starter strip.

Q. How about backing? A. No backing.

Q. How about siding? [975] A. Pardon?

Q. Siding?

A. What do you mean, siding? There is no acoustical tile—that is not an acoustical tile item at all.

Q. I see. Furring.

A. We have no furring strips that are available.

Q. Wallboard?

A. Wallboard is available through wholesale distributors, not direct from us.

Q. Insulating tile.

A. I assume you mean decorative tile?

Q. Yes.

A. That is available through wholesale distribu-

(Testimony of Browning Baymiller.)

tion, wholesale distributors, and not directly from us by the contractors.

Q. Was that all the situation that pertained at the time we are talking about?

A. That was in effect at that particular time.

Q. Now, when did you next have any connection with the plaintiffs' operations personally?

A. I had no personal contact that I remember between that time and at the time that we severed our business relations with the plaintiffs.

Q. Prior to the time of severing that relations, what information was brought to you that bore on the plaintiffs' [976] activities, that later led to that decision on your part?

A. Most of the information that I received in regard to the—any breach of agreement, which might have been going on at that time came to me second-handed through Mr. Lewis.

Q. Who is Mr. Lewis?

A. He is Mr. Harkins' assistant, of the manager of the building materials division.

Q. Did your duties require you to take any action personally with respect to that information?

A. In the absence, at that particular time, of—absence of Mr. Ragland, I did a little temporary work, yes.

Q. What did that consist of?

A. Well, I made a call at one, two—at a couple of our Los Angeles customers there.

Q. Why did you make those calls?

(Testimony of Browning Baymiller.)

A. I made those calls at the request of Mr. Lewis.

Q. What information did he give you that prompted you to call? A. Mr. Lewis?

Q. Yes.

A. He gave me the information that we had reports—we had had reports the plaintiffs, who at that time were our customers, had breached their agreement or understanding with us, and were operating in the metropolitan Los Angeles [977] area.

Q. Was there anything brought to your attention about complaints by any of your contractors?

A. No, not necessarily.

Q. At that time? A. At that time?

Q. Yes.

A. If there were complaints, why, they were given to Mr. Lewis and not myself.

Q. Whom did you see first in that regard?

A. If my memory serves me correctly, I saw Mr. Newport of Coast Insulation first.

Q. What did Mr. Newport say on that subject?

A. Well, Mr. Newport was wanting to know if we had taken on an additional customer in the metropolitan Los Angeles area, and I told him no, that we had not.

Q. Did he at that time make any threats about his relations with The Flintkote Company?

A. No, sir.

Q. Did he make any statements about boycotting The Flintkote Company? A. No, sir.

(Testimony of Browning Baymiller.)

Q. Where, by the way, is Mr. Newport at the present time, if you know?

A. I am told by a member of Mr. Newport's former firm [978] that he is on an extended trip in Europe.

Q. Where did you see Mr. Newport?

A. At Mr. Newport's office.

Q. What, if anything, did you state that Flintkote proposed to do in this connection?

A. This particular meeting was just to the point that we had nothing at hand, no facts at hand for us to take any action whatsoever, and that the case would be given just review and that a just decision would be made as to what we desired to do about it.

Q. Did you call on any of the other people at that time that dealt in Flintkote acoustical tile?

A. Yes, I called on Mr. Howard and I called on Mr. Hoppe of the Sound Control Company.

Q. Was there any meeting of all those people at any one time and place? A. No, sir.

Q. Did you ever hear of any such meeting?

A. No, sir.

Q. At any time during your contacts with these people, did you make any promises of any action that Flintkote would or would not take in connection with this matter? A. No, sir. [979-980]

Q. During this period did any of these people come to The Flintkote office while you were present? A. No, sir.

Q. What, if anything, happened in connection

(Testimony of Browning Baymiller.)

with this operation after Mr. Ragland's return to the Flintkote office, if you know personally?

Mr. Ackerson: Have you established that Mr. Ragland was away?

Mr. Black: He stated he was away. He said "in his absence."

Mr. Ackerson: I didn't hear it. I beg your pardon.

The Witness: The information was given to Mr. Ragland, in fact Mr. Ragland came to my office immediately upon his return, and I gave him the information that I had and what I had done up to date and for further instructions or further information why for him to see Mr. Lewis.

Q. When did you first learn personally that the plaintiffs had an office in Bell, California?

A. It was during the court of that week sometime.

Q. Had you seen anything that called to your attention prior to that time that there might or might not be a Bell address or a Los Angeles telephone number used by the plaintiffs?

A. I had seen nothing whatsoever.

Q. What next took place in connection with this matter [981] in which you personally participated?

A. The next event took place at the end of Mr. Ragland's report, his investigation and his report, when he, Mr. Ragland, Thompson and I were in Harkins' office and Harkins had reviewed the facts as presented to him by Mr. Ragland and had made his decision and instructed us what to do.

(Testimony of Browning Baymiller.)

Q. What did he instruct you to do?

A. Mr. Harkins' statement to us was that inasmuch as this firm known as the aabeta company had breached their agreement with us and had moved into the metropolitan area without our sanction and without our blessing, there was no reason to believe that such a subversive move at a later date might not happen again, and there was no reason to continue doing business with them even in San Bernardino and Riverside Counties.

Q. What, if anything, did you personally do after that conference?

A. In company with Mr. Thompson and Mr. Ragland I proceeded to the Bell Avenue address, the next day I believe.

Q. And who was present when you arrived there? A. Mr. Lysfjord.

Q. Did Mr. Waldron eventually come to that meeting? A. Yes, sir.

Q. And did that make five of you there?

A. That is right. [982]

Q. What was said to the best of your recollection at that conference?

A. Mr. Thompson was the spokesman for our group, and he informed them that with the establishment of the Bell Avenue place of business and operating in the metropolitan Los Angeles area, that that constituted a breach of our agreement and in that case it would be necessary for us to cease selling them merchandise.

(Testimony of Browning Baymiller.)

Q. What, if any, response was made by the plaintiffs or either of them to that statement?

A. The response appeared to be more of a shock than anything else. They could hardly understand. Either they understood it or they took the time to gather their thoughts together for an answer.

Mr. Ackerson: May I have that stricken, your Honor, as a conclusion?

Mr. Black: That probably is.

The Court: So ordered.

Tell us what they said.

The Witness: Mr. Lysfjord or Mr. Waldron, one of the two of them, asked then, "Do you really mean that we are no longer a Flintkote customer, that we can no longer buy?"

And Mr. Thompson answered that that is correct.

Q. (By Mr. Black): What, if anything, was said at that meeting in connection [983] with possible contracts or commitments that may have been made by the plaintiffs?

A. Mr. Thompson informed them that any contracts which they had on hand, that we would honor those orders and we would honor them regardless of the area, and we would furnish them at the low-down carload cost of what they had figured it at, so that they would suffer no financial loss whatsoever by the severance of this relationship.

Q. Do you recall anything else that was said at that meeting?

A. And it was also mentioned——

Q. By whom?

(Testimony of Browning Baymiller.)

A. By one of the plaintiffs, what about quotations that they had out on which they didn't yet have signed contracts.

And Mr. Thompson informed them that we would give them a reasonable length of time for them to convert any quotation or commitment that they had out into a contract, and we would so honor that order.

Q. Do you recall anything else?

A. That is all I recall.

Q. Do you know whether anything was said by anybody at that meeting about pressure from other contractors? A. No, sir.

Q. Is it that you don't recall it or that you state that that did not happen? [984]

A. I don't recall. I am sure the word "pressure" was not used.

Q. Do you recall whether anything was said by you, Mr. Ragland or Mr. Thompson about the matter of authority to make this decision, or higher-ups, or superiors, or anything of that general tenor?

A. I do not recall a conversation of that nature.

Q. Specifically did Mr. Thompson say that he was sorry he had to make this decision because he was ordered to do so by higher-ups in the company?

A. He could have placed it with those words, but I do not recall his exact words.

Q. Do you have any recollection of anything being said on that score? A. No, sir.

Q. At any time up to this termination meeting, did you have any knowledge or notice of any busi-

(Testimony of Browning Baymiller.)

ness allocating plan among the acoustical tile dealers in the Los Angeles area? A. No, sir.

Q. Did you have any information regarding any plan to fix prices? A. No, sir.

Q. At any time prior to the termination was any information brought to you to the effect that if you did not discharge these plaintiffs there would be economic pressure [985] brought against you by the acoustical tile dealers that you dealt with in this area? A. No, sir.

Q. What, if any, contact did you have with the plaintiffs or either of them following this termination meeting, Mr. Baymiller?

A. The next personal contact was somewhat, I would say, a week or 10 days later, when the plaintiffs brought into my office a recap of their contracts that they had signed up, with their orders to us to furnish against the contracts that they had on hand. [986]

Q. Do you recall which one of the plaintiffs you dealt with at that time?

A. I believe, it is my recollection that they were both there.

Q. You are not sure of that, though?

A. I am not sure whether both of them stayed, but I believe that they both came in and one of them might have gone off—gone into another office.

Q. What did you say to the plaintiffs on that occasion?

A. I looked over the contracts they presented to me and with the orders they had to place against

(Testimony of Browning Baymiller.)

those contracts, and they were all bona fide orders against those contracts, of which I accepted them.

Q. Did you reject any orders?

A. I rejected one order that was not against one of their contracts. It was a materials sale.

Q. To whom was that?

A. The L. A. Downer Company of Riverside.

Q. In your narration of the various contacts you had with the plaintiffs, you didn't mention, Mr. Baymiller, meeting with Mr. Harkins at the plaintiffs. Were you present at any such meeting?

A. No, sir, I was not present at the meeting that the plaintiffs first met Mr. Harkins.

Q. Where were you at this time?

A. I was on an extended business trip into New Mexico and Texas.

Q. Did you have anything to do with a job at the Owens Roof Company?

A. I had nothing to do with the actual outcome or the execution of it. I will be happy to relate what I know, if you care to hear it.

Q. What do you know about that job, of your own knowledge?

A. Mr. Anderson, who is one of the salesmen that services the Owens Roofing Company, came into my office and said that a McLane of the Owens Roofing Company desired to buy some acoustical tile for the ceiling in his own office. We do not sell——

Mr. Ackerson: I object to that as not responsive, volunteered.

(Testimony of Browning Baymiller.)

The Court: You can't tell what you do not. Go ahead with the conversation.

Mr. Ackerson: Who was present?

Q. (By Mr. Black): Who was present, just you and Mr. Anderson?

A. Mr. Anderson and myself.

Q. What next developed in connection with that?

A. I told Mr. Anderson we respected the acoustical tile customers and do not sell them roofing, just like we [988] respect the roofers and do not sell the roofers the acoustical tile, so it would be necessary if he wanted to do that job himself to buy that material from one of our authorized acoustical tile applicators in the metropolitan L.A. area.

Q. Did you have any contact with the plaintiffs in respect to that job? A. No, sir.

Q. Did you make any reference to any particular dealer from whom that tile was to be purchased?

A. Yes, in Mr. Anderson's presence there I phoned the R. E. Howard Company and obtained a price on one-inch tile that Mr. McLane wanted, and I gave that price per square foot to Mr. Anderson, which was Mr. Owens—or Mr. McLane's cost from R. E. Howard, and I gave it to Mr. Anderson and that was the last contact that I had with that job.

Q. Did you at the time know who was going to do that job? A. No.

Q. Is there anything else I haven't covered, Mr. Baymiller, that bears directly on your relations with the plaintiffs or either of them, in connection

(Testimony of Browning Baymiller.)

with this matter? A. I believe not.

Mr. Black: Then that is all. You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. Mr. Baymiller, I am going to show you Plaintiffs' [989] Exhibit 44. It purports to be the financial statement submitted at yours and Mr. Thompson's request, after that second meeting at the Manhattan Supper Club.

That was presented to Flintkote at the time they came down or about the time they came down to the Harkins meeting, wasn't it?

A. I don't know, your Honor—sir.

Q. Did you ever see it? A. I never did.

Q. You never saw it in your life before?

A. No.

Mr. Black: Mr. Baymiller, the reporter can't get a shake of your head or a nod.

Mr. Ackerson: The answer was no, Miss Reporter.

Q. (By Mr. Ackerson): Never until today did you see this document, Mr. Baymiller?

A. I don't recall ever having seen that document.

Q. You do recall it being requested and you do have knowledge that it was furnished The Flintkote Company, though, don't you?

A. I recall it was requested and I am sure it was furnished to us. If not that one, one that would be acceptable there for credit purposes.

(Testimony of Browning Baymiller.)

Q. The reason for requesting that document, as you have indicated, is to see just what these boys had behind them [990] by way of finances, wasn't it? A. That is right.

Q. So that that document was of particular interest to Flintkote and would have been examined quite thoroughly before you said, "O.K., you are in"? Before you gave them a line of acoustical tile. Pardon my slang.

A. Being in the sales department, that wouldn't, that document would have no interest to me. That would be for our credit department.

Q. Yes. But you do request it for your credit department? A. That is correct.

Q. Even before you decided to give these people a line of tile? A. That is correct.

Q. My question was, your credit department and whoever had the authority to give the line, would want to know what was in that document before doing it, wouldn't they? A. Certainly.

Q. Now, Mr. Baymiller, do you know of any contact, any written contact with these plaintiffs—strike that, Miss Reporter.

Was there any written communication of any type between Flintkote and these plaintiffs or either of them concerning these so-called rumors you have mentioned? [991]

A. I don't recall of any written contacts at all.

Q. When Mr. Lewis told you about them, why didn't you just call the plaintiffs up and ask them about them? Why didn't you ask them if they were

(Testimony of Browning Baymiller.)

doing business here, if you didn't know? You had their telephone number; Ragland had it.

Why didn't you just call them up and say, "Mr. Waldron, Mr. Lysfjord, are you doing business in Los Angeles here"?

A. I didn't have their telephone number.

Q. Well, do you know of any reason why, after you told Mr. Ragland about it upon his return, why he didn't call them on the phone and do it the easy way, just ask them?

A. He did when he found their phone number.

Q. What is it?

A. He did call them finally when he got their number.

Q. He called them. Did you hear Mr. Ragland's testimony? A. Part of it.

Q. Did you hear him say that as soon as he talked to you he went down to see them, he called them and made an appointment and went——

A. That is just what I said.

Q. Yes. All right. And you say you did not have a telephone number available to you.

A. I did not.

Q. Is that the only reason you didn't call them? [992]

A. I would not say it is the only reason, no.

Q. Your purpose was to find out, according to your testimony, whether or not they were doing business in the Los Angeles area. That was the basic purpose, wasn't it? A. That is right.

(Testimony of Browning Baymiller.)

Q. Then I take it you did not call Information and find out if aabeta co. was listed?

A. No, I did not.

Q. And what did these rumors have to say about where they were located? Did Mr. Lewis tell you where they were supposed to be doing business?

A. Mr. Lewis had the one address, but it was wrong.

Q. Well, you didn't call the Telephone Company and ask for aabeta co.'s number at that address then, did you? A. No, I did not.

Q. You didn't call the Telephone Company at all. The first thing you did was get a list of contractors from Mr. Lewis and go out and start making calls on them, is that right? A. No, sir.

Q. What was the first thing you did?

A. I called on, as I testified a moment ago there, I called on three of our customers and informed them that we were making a thorough investigation. If we had—if aabeta was operating in the L.A. area, and that we would give it a just review. [993]

Q. Did Mr. Lewis tell you to call on these three contractors? A. Yes.

Q. And he named Newport, Hoppe and Howard, didn't he? A. Yes, sir.

Q. Did he also name Gus Crouse out at Coast Insulating?

A. Well, Crouse and Newport would be considered in the same company.

Q. Did he tell you to see Crouse too?

A. No, sir.

(Testimony of Browning Baymiller.)

Q. Let's start with this first meeting at the Manhattan Club, Mr. Baymiller, that you attended.

I think we are all acquainted with who attended that. Mr. Thompson was not present and Mr. Waldron was not present at that meeting?

A. That is right.

Q. Otherwise it was you, Ragland and Lysfjord, is that right? A. Correct.

Q. And at that meeting Mr. Lysfjord did try to sell himself as an experienced salesman with contacts who could do a job for Flintkote, didn't he?

A. Yes, sir.

Q. And he mentioned many of these same contractors, the list of which were contained in this portfolio that [994] he brought later on?

A. That was at the next meeting.

Q. Yes, but at this meeting, at this first meeting, he mentioned those contractors in the sales talk to you, didn't he?

A. Those specific ones? I would say that he mentioned no specific ones. They might not have even had those contracts at that time.

Q. Not the contracts, but the contractors. He mentioned the people in this area that he had been selling, that he brought from the Coast company to the Downer company, that he brought into the Downer company for the first time?

A. Yes, sir.

Q. And that he would continue to sell those people? A. Yes, sir.

Q. He said that, didn't he? A. Yes, sir.

(Testimony of Browning Baymiller.)

Q. And, as a matter of fact, you asked him whether he could, didn't you?

A. I don't recall that I did ask him.

Q. Mr. Ragland said very little at that meeting, did he?

A. I would say that he didn't have much to say.

Q. The purpose of the meeting was to show to you that the high recommendations that Mr. Ragland had previously given [995] you concerning these two plaintiffs were true, he wanted you to meet them and approve them too, didn't he?

A. Yes.

Q. Now in the absence of Mr. Thompson at this meeting, your testimony was that you pointed out to Lysfjord that there was no opening in the Los Angeles territory, is that right?

A. That is correct.

Q. And that there was an opening maybe in Riverside and San Bernardino?

A. I don't recall that that was specifically talked about at that first meeting.

Q. Well, either at the first meeting or the second meeting at the Manhattan Club, isn't it true, Mr. Baymiller, that the gist of the conversation, as far as Mr. Thompson and yourself was concerned, was to this effect: We are not represented properly in Riverside and San Bernardino, it would help us to get you tile if you would agree to serve those areas also?

A. No, sir, that is not the gist of the conversation.

(Testimony of Browning Baymiller.)

Q. Well, let's pass to the second meeting, Mr. Baymiller.

At this meeting I think you are mistaken when you said Mr. Waldron brought the portfolio, I think it was Lysfjord who brought it. [996]

A. It could have been.

Q. At any rate, at this meeting this portfolio contained the names of Jackson Bros., Hayden-Lee and others, didn't it? A. Correct.

Q. And you say that after the meeting—and I take it while you were all still present—you examined those contracts?

A. No, it was during the meeting that I looked them over.

Q. In other words, you didn't take that portfolio home because Lysfjord was on his way to the Downer company with them to have them fulfill the contracts?

A. I had no use for the portfolio.

Q. I believe you stated that most of those contracts involved decorative tile, or half of them did, about half of them.

A. I would make an estimate of about half of them.

Q. And do you recall that there was—I don't know whether it was \$20,000 or \$50,000 worth of contracts in that portfolio—do you recall which it was?

A. I don't recall that any specific dollar value was mentioned.

Q. But it was a large dollar volume, wasn't it?

(Testimony of Browning Baymiller.)

A. I don't know. [997]

Q. By the way, tell me what is the difference between what you term decorative tile and just ordinary acoustical tile? What is the distinction, Mr. Baymiller?

A. Decorative tile is a tile that is manufactured of the same basic material as the acoustical tile but there have been mechanical alterations of the basic material that converts it into an acoustical tile that is used for purposes of noise reduction.

Q. What you are actually saying in a layman's language is that the two tiles are substantially identical, they are made by the same process out of the same material, but to put it simply, the distinction is you punch holes in the acoustical tile and you don't punch holes in the decorative tile? Isn't that about the difference as a practical matter?

A. Basically that is correct. However, you have different sizes and different thicknesses on your acoustical tile that you do not have in decorative tile.

Q. Yes, I realize that. And Flintkote made both of them at that time, didn't they?

A. That is correct.

Q. And so if I understand your testimony, Flintkote sold decorative tile to everybody that it sold acoustical tile to and in addition to that they sold it to lumber yards and everybody else, is that correct? A. That is not correct. [998]

Q. I misunderstood you. What is the statement?

A. We sell decorative tile to wholesale dis-

(Testimony of Browning Baymiller.)

tributors as a dealer item, who resell it out to acoustical tile contractors and to lumber yards.

Q. So that if Mr. Newport's firm, Coast Insulating, ordered a carload of 12 x 12 one-half inch or three-quarter inch tile, assorted acoustical tile, and they needed certain decorative tile to finish the job, the job for which the carload was ordered, you would not include in the carload that tile to Coast, but you would make them go to a wholesale yard here in Los Angeles to buy it?

A. That is correct.

Q. That is your policy as to selling?

A. We do not sell decorative tile direct to an acoustical tile contractor.

Q. Even though it is the same tile except for thickness and sizes without the holes in it?

A. It is sold under an entirely different type of merchandising and a different type of discounts and a different pricing system.

Q. I understand.

Now let me ask you this: The amount of decorative tile that the average acoustical tile contractor needs in the regular course of his business is a very, very small portion of the total tile he uses, isn't it? It is a negligible [999] amount?

A. Are you telling me or asking me?

Q. I am asking you. Isn't that about right?

The Court: He is always asking questions.

The Witness: The amount of decorative tile that is used by an acoustical tile contractor varies in accordance with the type of work that the man

(Testimony of Browning Baymiller.)

does. Some acoustical tile contractors will use a world of decorative tile, others will not use very much.

Q. (By Mr. Ackerson): Well, let's take public works like schools and hospitals and things of that sort. In the average job that the acoustical tile contractor performs in that type of public works, is there much decorative tile used?

A. Prior to 1952 it was heavy to decorative tile; since 1952 and 1953 it is heavy to acoustical tile.

Q. I don't quite understand that. Prior to 1952, you mean to say that those jobs consisted mostly of decorative tile? A. Yes, sir.

Q. More decorative tile than acoustical tile?

A. Yes, and there is a reason for that.

Q. I just want the answer. You can give the reason later if you wish.

And since 1952 it is what, substantially all acoustical tile? [1000]

A. It is heavier towards acoustical tile.

Q. What do you mean "heavier"? Do you mean substantially all? A. Heavier in footage.

Q. Substantially most all of the footage is acoustical tile?

A. Not all of it, but I would say the biggest percentage of it is acoustical tile.

Q. Now you recognized some of the names of these contractors contained in this portfolio that Lysfjord brought along at this second meeting, didn't you?

A. I recognized—I recalled only two of them.

(Testimony of Browning Baymiller.)

The Court: Are you going to another subject, Mr. Ackerson?

Mr. Ackerson: Yes. This is as good a time as any.

The Court: We will take up Hutchinson v. Pacific Atlantic Steamship Company in chambers. Will the reporter and the clerk please come to chambers for that purpose.

The case presently on trial will stand adjourned until tomorrow afternoon at 1:30 p.m.

(Whereupon, at 4:40 o'clock p.m., an adjournment was taken until 1:30 o'clock p.m., Thursday, May 19, 1955.) [1001]

May 19, 1955, 1:30 P.M.

The Court: The jury and alternate being present, you may proceed.

Mr. Ackerson: Will you resume the stand, Mr. Baymiller?

BROWNING BAYMILLER

the witness on the stand at the time of adjournment, having been previously duly sworn, was examined and testified further as follows:

Cross-Examination

(Continued)

By Mr. Ackerson:

Q. As I recall, Mr. Baymiller, yesterday we had covered your lack of knowledge of the financial statement and had gotten up to and including about the first meeting at the Manhattan Club.

(Testimony of Browning Baymiller.)

And I believe we started on the second meeting at the Manhattan Club in which five of you attended.

You stated that you had examined the portfolio of contracts which, I believe, Mr. Lysfjord brought along, and perhaps they were contracts of both these parties, I don't know, both Waldron and Lysfjord, but whether that be so or not I believe you stated that the presentation of these contracts was highly effective for the purposes of the plaintiffs, that they had in mind. [1003]

Do you recall that statement in substance, a statement like that? A. Yes, sir.

Q. And the purpose these people had in mind was to get Flintkote tile for application in the Los Angeles area, wasn't it? I am not asking you what you told them, but that was the purpose for which they presented those contracts, wasn't it?

A. Not specifically.

Q. But partially? A. Partially.

Q. Yes. Now, you stated, as I recall, you couldn't see where Flintkote could make much money or be benefited greatly by having work from those contractors, but I assume that you meant work in the San Bernardino area from those contractors, didn't you? A. I don't recall making that statement.

Q. I will ask you a different question then. You saw the contracts and they were substantial contracts, were they not?

A. I looked over them briefly, yes.

(Testimony of Browning Baymiller.)

Q. They were with substantial contractors, weren't they, general contractors?

A. They were with general contractors.

Q. They were all Downer's contracts, weren't they? All the work was to be performed by Downer Company? [1004]

A. I assume they were. I had no evidence, other than the contractors' original contracts.

Q. Now, the Downer Company at that time didn't handle Flintkote tile at all, did it?

A. They did not.

Q. So that as long as Downer Company continued to get these so-called accounts of Lysfjord or Waldron, Flintkote was out in the cold, so to speak, weren't they?

A. On Downer contracts?

Q. Yes.

A. We did not solicit Downer business at all.

Q. But any contracts Downer got for acoustical tile, Flintkote couldn't participate in, could they, couldn't furnish the tile for?

A. We may not choose to furnish it.

Q. You didn't at the time?

A. We didn't furnish it, no.

Q. No. Assuming that Coast Insulating were successful in taking one of these general contractors away from the Downer account, you—by you I mean Flintkote—had no assurance that Coast would use Flintkote tile on the job, did you?

A. We had no absolute assurance, no.

(Testimony of Browning Baymiller.)

Q. No. They could have used what brand of tile?

A. On most of the contracts they could have bought any [1005] Tom, Dick or Harry tile. Most of the—the majority I saw were decorative tile.

Q. Let's take the acoustical tile contracts. You said your recollection was that half of them were for acoustical tile. What other brand of AMA acoustical tile could Coast have used? They have another brand, don't they?

A. Oh, yes. They had Simpson brand, which could have been used, providing that would have met the requirements of the specification.

Q. It will meet any AMA requirements?

A. That is a rather loose statement to make.

Q. Well——

A. It will not meet any AMA requirements.

Q. Well, as far as Coast is concerned at least, providing the Simpson tile met the requirements—you don't have any agreement with Coast that they will use Flintkote tile exclusively, do you?

A. No.

Q. Or halfway or anything at all?

A. No. We have no assurance that they will give us a nickel's worth of business, for that matter.

Q. That is right. They could divert it all to Simpson, couldn't they?

A. They could if they so desired.

Q. That is right. And the same thing goes with Howard, only he could divert it to U. S. Gypsum tile?

(Testimony of Browning Baymiller.)

A. That is right, providing their tile would meet the specifications.

Q. And you don't deny the tile would meet the specifications 99 times out of a hundred, do you, in public works?

A. It all depends on how the specification is written, Mr. Ackerson, and you would have to look at each individual specification to answer that question.

Q. It is AMA approved tile, is it not? It is tested by AMA and has an AMA rating, doesn't it?

A. I only regret that you don't understand the values [1007] out of the AMA catalog a little better.

Q. Can you answer the question? It does have an AMA rating, doesn't it?

A. In regard to sound absorption, yes.

Q. And it is used on public works, isn't it?

A. Where it meets the specifications.

Q. And it does usually meet the specifications, doesn't it?

A. It all depends on how the specifications are written and the requirement of the specifications.

Q. Tell me a public work that you know—you know, don't you, Mr. Baymiller, that any public works contract has to have an "or equal" clause in it, doesn't it?

A. That is right.

Q. In other words, a contractor in a public works contract can't say, "I want Flintkote tile and that is all"?

A. He can say "I want Flintkote tile or an approved equal."

(Testimony of Browning Baymiller.)

Q. That is right, "or an approved equal."

Now you tell me one specific instance in your mind in a public works where U. S. Gypsum tile was not considered an approved equal to Flintkote acoustical tile.

A. I am unable to do that because I am not specifically familiar with every job that comes up.

Q. But you can't recall one job in the history of [1008] your association with Flintkote where that wasn't so?

A. It has not been brought to my attention.

Q. That is right. And the same thing would go with National Gypsum tile? A. That is true.

Q. So that you state that these plaintiffs were told that they couldn't sell these established customers of their Flintkote tile in Los Angeles, is that what you said, that they could not continue to sell these customers Flintkote tile in the Los Angeles territory here, and that that was stated to them at that meeting?

A. Would you restate the question, please?

Q. Maybe I can simplify it. It was rather involved.

I understood you to testify that at this second meeting either you or Mr. Thompson told these plaintiffs that they no longer would be able to sell these customers that were listed on these contracts—I am talking about Hayden-Lee, Jackson Bros., and so forth—they could no longer sell them if they got Flintkote tile.

A. They were told that they could not execute

(Testimony of Browning Baymiller.)

any contracts for these particular contractor customers of theirs in the metropolitan Los Angeles area.

Q. They were told that, you are stating, at that meeting?

A. They were told that at the second [1009] meeting.

Q. That is what we are talking about. And Mr. Thompson told them, I believe you said?

A. Mr. Thompson told them that in the event that they came up with one of those jobs at a later date that we would talk about it on each individual case, and we may or may not sanction it.

Q. Even though Flintkote couldn't sell the tile otherwise? In other words, they had to go out and get a contract with Jackson Bros. for a couple of markets and then come in to Mr. Thompson and say, "Now, can we execute this contract?" Is that what you are saying?

A. That would be the specific individual case that we would review at that time.

Q. And suppose you found that unless you approved this contract, which they obviously couldn't get if they didn't have the tile in advance, but assume they could, suppose you found that Mr. Howard was going to put U. S. Gypsum tile in the job unless these people got it, would you let them do it?

A. It would be perfectly all right.

Q. And the same thing would be with Hayden-Lee?

A. Certainly.

Q. And the same thing would be with any other

(Testimony of Browning Baymiller.)

general contractor here, whether it was these people that they had special contacts with or not, is that right?

A. Mr. Ackerson, the selling of a contract to a general [1010] contractor is handled mainly by the acoustical tile contractor, and we do not become involved in that until such time as one of our customers or one of some competitor's customers has that contract.

Q. That is right. But isn't it true from your own experience, Mr. Baymiller, that it is impossible for an acoustical tile contractor to go out and solicit and actually pledge himself, and obligate himself to orders unless he can get the tile, unless he knows he has it? Is that what Mr. Thompson expected these people to do, according to your statement?

A. Well, we executed the terms of our agreement on those contracts which the plaintiffs presented to us upon termination of the association.

Q. Yes, but that doesn't answer my question. I am asking if that was the purport of what Mr. Thompson told these plaintiffs at this second Manhattan Club meeting.

A. He told them that in the event that they had a contract like that we would look at it at a later date at the time that the order came up and we would tell them at that time whether we would or would not permit the execution of that contract in the Los Angeles area.

Q. And was that statement limited to just these contractors named in this portfolio of contracts,

(Testimony of Browning Baymiller.)

or did it apply to any other contractor in the Los Angeles area? [1011]

A. It was not limited to the names of the people who were in the portfolio because we had no record other than just the memory of a couple of them that were in them.

Q. Then it meant any contractor, didn't it?

A. Yes, it could have meant any.

Q. Then I take it that the gist of Mr. Thompson's statement was only this—wouldn't the effect of that statement be this, Mr. Baymiller—that we won't consider giving you tile for an executed contract until it is executed? That is about the gist of what you say Thompson told them, wasn't it?

A. No, before the plaintiffs—they are certainly wise enough to have contacted us to find out whether they should take the contract or not in a case like that. [1012]

Q. I think they are very wise, but I mean that wasn't part of Mr. Thompson's statement, was it?

I mean there was nothing said that "You are wise enough to do this or do that," was there?

You thought they were wise enough to be Flintkote dealers——

A. Contracts were not mentioned. It was just jobs, specific jobs. Now, that could be before the contract was signed or before it was even bid.

Q. So that now you say that the gist of Mr. Thompson's statement wasn't, "Present us with the contracts and we will decide"?

Mr. Black: That is objected to. That is assum-

(Testimony of Browning Baymiller.)

ing a fact not in evidence. This witness has testified as to specific jobs and we object to putting a construction on it that doesn't bear out what the witness has testified on direct examination.

Mr. Ackerson: I understood he said specific jobs, yes, specific contracts.

The Court: The objection is overruled. But if the witness has been misunderstood, he may clarify it in his answer.

The Witness: I would say that the reference in this conversation was made to jobs, which would represent the jobs in progress of being bid for the general contract and up to the time the order or contract was actually let. [1013]

Q. (By Mr. Ackerson): Well, then, let me see if I have it straight. Then Mr. Thompson meant, according to your understanding, that all they had to do was clear each job in the Los Angeles territory with Mr. Thompson in advance?

It almost boils down to that, doesn't it?

A. But they had no assurance that the answer would be in the affirmative.

Q. No, that is what I am getting to. Why did Mr. Thompson want them to clear it in advance? Was it because Mr. Thompson wanted to make sure that none of the other established contractors could do it? Did he say anything along that line?

A. No, sir.

Q. Did he state any other reason why he wanted this clearance in advance?

A. He stated no other reason. There were no

(Testimony of Browning Baymiller.)

further questions asked by Mr. Waldron, after he asked Mr. Thompson the question, if he could haul material back into the Los Angeles area.

Q. Well, at this meeting Mr. Thompson requested the financial statement, and that was submitted later. A. That is correct.

Q. I believe you stated, Mr. Baymiller, that Mr. Waldron or Mr. Lysfjord did make the statement that there would be objections by competing contractors when they got [1014] the tile—if they got your line of tile? You stated that, didn't you?

A. Yes, I stated that.

Q. Let me ask you this question: Didn't Mr. Thompson—almost his exact words were, or, at least, substantially his words were this—to the effect that Mr. Lysfjord and Mr. Waldron didn't need to worry about this pressure, that Flintkote was big enough to take care of itself? Wasn't that about the gist of it?

A. I am sure the word "pressure" wasn't used.

Q. All right then. Suppose he used the words "Don't worry about force or anything"—

A. The substance of Mr. Thompson's answer was that we anticipated no opposition in the San Bernardino and Riverside areas. We reserved the right to choose our customers in that area or in any other area.

Q. Well then, isn't it a fact that Mr. Thompson didn't mention the San Bernardino or Riverside areas?

He told them they needn't worry, that Flintkote

(Testimony of Browning Baymiller.)

was big enough to take care of itself? That was just about the words he used, wasn't it?

A. By this time in the meeting or in the conversation—

Q. Can you answer that yes or no?

A. State the question again.

Q. Mr. Thompson's words were, to the effect, and had no [1015] reference, No. 1, to the Riverside area, did it, in that respect—

A. He made no reference to the Riverside area. By that time in the meeting the plaintiffs had understood that was the area they were to be operating.

Q. So Thompson didn't say Riverside and San Bernardino in his reply?

A. It wasn't necessary to do that.

Q. But he didn't say it, did he?

A. He did not say it because the plaintiffs by that time understood the area we were talking about.

Q. At least, that is your present opinion, that the plaintiffs understood it? A. Yes, sir.

Q. I wanted to know merely whether Thompson actually said it.

Now, you were asked whether or not Waldron pointed out to you or stated in substance and effect that acoustical tile contractors in this area had gotten together and were organized.

Did he make any statement to that effect?

A. I don't recall any such statement.

Q. But you do know as a representative of

(Testimony of Browning Baymiller.)

Flinkote, assistant sales manager of Flintkote, that all of the sources of AMA tested tile that was sold in this area, at that time, were in the hands of the acoustical tile contractors already [1016] then operating in Los Angeles, did you not?

A. Yes, I understood—I would make that statement, that the lines were all taken up.

Q. Yes. And you knew, didn't you, that their chance at that time of becoming competitive acoustical tile contractors depended upon whether Flintkote made them authorized dealers of its line?

A. No, I cannot say that the success of their operation would depend on our decision.

Q. Was there anything said at that meeting, Mr. Baymiller, that would lead you to believe that they would cease their connections with the Downer Company and the remuneration they were getting there then, unless they got Flintkote tile?

A. I don't know as it was said at that meeting, but I was told either on the telephone or at one time by the plaintiffs that their intentions were to sever their relations with R. W. Downer Company.

Q. If they could get Flintkote tile?

A. That was not in the conversation at all.

Q. Who was it, one of the plaintiffs, you were talking to on the phone?

A. Yes.

Q. When was that?

A. I cannot recall the exact date.

Q. Was it before the first meeting at the Manhattan Club? [1017] It must have been, wasn't it?

(Testimony of Browning Baymiller.)

A. No.

Q. It was after that, was it?

A. It must have been after that or it might have been at that meeting.

Q. In other words, they were going to sever their connections with the Downer Company whether or not they got any tile or not, is that what you stated?

A. That was not specifically stated.

Q. Now, you stated that you went out to see Newport, Howard and Hoppe after you talked with Mr. Sidney Lewis. A. Correct.

Q. You went out to their offices and you had a conversation with each of them, Mr. Newport, Mr. Hoppe and Mr. Howard? A. Correct.

Q. Is that correct? A. That is correct.

Q. As I gather from your testimony, you wanted to find out whether or not these plaintiffs were doing business in the Los Angeles territory.

A. That was not the purpose of the visit to those three customers.

Q. I don't think it was, either, Mr. Baymiller. I think the purpose, and I suggest—— [1018]

The Court: We don't care what you think it was.

Mr. Ackerson: I am sorry.

The Court: Go ahead and ask the question.

Q. (By Mr. Ackerson): The real purpose and your instructions from Mr. Sidney Lewis was to go out there and see what you could do to placate these people about this Los Angeles business, wasn't it, Mr. Baymiller? A. No, sir.

Q. Was there any other purpose in finding out

(Testimony of Browning Baymiller.)

what knowledge they had about these plaintiffs being in business in the Los Angeles area?

A. No, sir.

Q. That was the only reason?

A. Do you want to know the reason? Do you want to know the reason I went out? Do you care to ask that question? I will answer it.

Q. You have stated it, that was the reason, didn't you, that you went out there to find out what they knew about these people operating in Los Angeles?

A. I did not make such a statement as that.

Q. Was there any reason why you couldn't have called these three customers of Flintkote on the telephone?

A. I think perhaps I did call them and made an appointment with them.

Q. Was there any reason why you couldn't ask them that [1019] question over the telephone?

A. Ask them what question?

Q. What they knew about this Los Angeles operation?

A. I did not go out there to find that out.

Q. You went out there under the instructions of Mr. Lewis, though, didn't you?

A. Yes, sir. [1020]

Q. And he told you that he had received rumors from these people about these plaintiffs' operations, didn't he?

A. That is correct.

Q. You did have these three customers' telephone numbers, didn't you, Mr. Baymiller?

A. Yes, sir.

(Testimony of Browning Baymiller.)

Q. Now you stated that when you got out to Mr. Newport, the No. 1 call, Mr. Newport wanted to know if you had established a new dealer in the Los Angeles area, is that right?

A. That is correct.

Q. And you said no? A. That is correct.

Q. And that is about as far as I got from your direct examination of what happened.

Now I want to ask you, what did Mr. Newport want you to do about it? Did he want you to cut them off? A. No, sir.

Q. What did he suggest?

A. He merely asked me if we had established an additional dealer in the Los Angeles area. The answer was that we had not.

And then I took up the conversation and said that we had rumors that our San Bernardino and Riverside outlet was beginning to solicit business in the Los Angeles metropolitan area, and that we were making an investigation and if we [1021] found that there was such activity going on that we would review the case and make a just decision on what we would do about it.

Q. That is all that happened? That is all the conversation you had?

A. It was a very short meeting.

Q. And Mr. Newport did not suggest any action to you at that time? A. No, sir.

Q. Did he tell you that he had already conferred with Mr. Lewis or Mr. Harkins? A. No, sir.

Q. But Mr. Lewis told you, didn't he?

(Testimony of Browning Baymiller.)

A. Mr. Lewis told me.

Q. So that your answer yesterday was the same as today, it was limited to what he said to you personally, not what he may have said to Lewis or to Harkins or anyone else?

A. That is correct.

Q. And he had no suggestions? That is all that happened? That is all that did happen out there?

A. That is correct.

Q. And you had his telephone number before you left?

A. Most certainly I had his telephone number.

Q. Did you call him for this appointment?

A. I don't recall whether I called Mr. Newport or I [1022] called his secretary for the appointment.

Q. Well, now, did you call Mr. Howard for the appointment you had with him out at this place?

A. Yes, I called Mr. Howard.

Q. What did you ask Mr. Howard?

A. I asked him no questions whatsoever.

Q. Didn't Mr. Howard object to these people being in business here?

A. They were not in business here.

Q. Didn't he object to their soliciting contracts here?

A. Not necessarily.

Q. What did he say in that regard?

A. He just asked me virtually the same thing as Mr. Newport did, as to whether or not we had set up an additional customer in the Los Angeles area.

Q. But he made no objections to you personally

(Testimony of Browning Baymiller.)

on that fact? A. No, sir.

Q. Or objected to these rumors of these plaintiffs soliciting business here?

A. No objections to me.

Q. And that happened out at Mr. Howard's place, according to your testimony, according to your best recollection? [1023]

A. It was not at Mr. Howard's place. I met Mr. Howard for lunch at a little cafe just north of Slausson.

Q. Right next to his place out there?

A. No, I would say it is five or six blocks away.

Q. And at no time during that meeting Mr. Howard objected to the solicitation of contracts here by the plaintiffs, is that your statement?

A. We had no direct or no concrete facts or evidence that there was business being solicited here. At that time we had not established the extent to which the plaintiffs had entered the Los Angeles field.

Q. I still don't understand what Howard said, then. What was his total statement to you on this luncheon meeting?

A. Well, Mr. Howard merely accepted my explanation there that we at that time were gathering the facts of the case for review.

Q. What did he say? Who opened the conversation? You went out there to see him. What did you say?

A. I don't recall that conversation verbatim.

Q. Did you say, "Mr. Howard, I am out here

(Testimony of Browning Baymiller.)

to investigate the activities of the plaintiffs in the Los Angeles area”?

A. I would not be investigating it at Mr. Howard's place of business.

Q. Did you say, “Mr. Howard, I came out here to [1024] investigate your feelings in the matter”?

A. No, sir.

Q. What did you say?

A. I believe I have answered that question several times, Mr. Ackerson.

Q. You said that when you find out the facts——

A. That is what I said.

Q. ——you will arrive at a just decision?

A. Yes.

Q. And that is all you said?

A. That is all I said in regard to this subject.

Q. What did Mr. Howard say when you said that?

A. Mr. Howard said, “Well, I will buy that as far as the activities are concerned, and when you establish your case, why that is your decision on it, it is perfectly all right with us.”

Q. Did Mr. Howard tell you that he had been down to see Mr. Lewis or Mr. Harkins about it?

A. No, sir.

Q. Though Mr. Lewis told you?

A. No, Mr. Howard I am sure was not down into our office.

Q. You didn't see him there?

A. I didn't see him down there.

(Testimony of Browning Baymiller.)

Q. But Mr. Lewis told you Mr. Howard had contacted [1025] him about these rumors?

A. Mr. Lewis did not tell me that Mr. Howard had contacted him.

Q. Did he tell you the R. E. Howard Company had contacted him? A. No, sir.

Q. He told you to go out and see Howard?

A. He told me to call on our present Los Angeles customers.

Q. Now you have related the whole conversation with Howard, haven't you?

A. As much as I can recall.

Q. Can you recall of any reason, if that is all you had to say, why you didn't call him on the telephone?

A. Well, I don't say that I did not call him on the telephone.

Q. Why you couldn't have consummated that conversation over the telephone just as easily?

A. Being in the sales department we do more than telephone contacts with our customers.

Q. That is your only explanation?

A. Yes, sir.

Q. Now I assume your statement would be about the same with respect to Mr. Hoppe, wouldn't it? Are there any substantial differences in what happened with Mr. Hoppe? [1026]

A. No difference whatsoever. It was all the same.

Q. You went out to his place and went through the same thing? A. Yes, sir.

(Testimony of Browning Baymiller.)

Q. No additions, no subtractions, in substance?

A. Very much the same thing.

Q. And your statement that no one of these three people suggested by act, word or deed, that you terminate these plaintiffs if you found they were doing business in the Los Angeles area?

A. There was no statement of that kind made to me by any of our customers.

Q. Made to you, at least to you?

A. That is what I said, made to me. [1027]

Q. Yes, I understand. Let's get to this. When Mr. Ragland got back—you completed your investigation, now, I believe, haven't you, insofar as this Los Angeles business is concerned?

That is all you did, I take it?

A. That is all I did. I made no investigation whatsoever.

Q. Then you went back to—now, let me ask you, did any of these two or three people during these conferences you had with them or these meetings you had with them, suggest the general locality of where the plaintiffs were alleged to be doing business?

A. No, I had no knowledge of where they were.

Q. Did any one of the three of them ever tell you that they understood they had gotten this Van Nuys Hospital job?

A. No, sir, I do not recall any name at all mentioned of Van Nuys Hospital job.

Q. Do you know where Mr. Ragland got those

(Testimony of Browning Baymiller.)

three jobs he was going to investigate? Did you give them——

A. I don't know, I didn't know he had three jobs to investigate.

Q. You didn't give them to him, anyway?

A. No, sir.

Q. When Mr. Ragland got back he came directly to your office, didn't he?

A. I believe I was the first party he talked with in our office.

Q. You told him about these rumors? [1028]

A. I told him about the rumors and I told him about my three calls to our three customers, and what I had told them and they had accepted it, what I had told them, and we were just waiting for him to get back to make an investigation of the plaintiffs' activities.

Q. Then you sent him into Mr. Lewis' office, is that right?

A. I don't know as I sent him. I suggested he go to see Mr. Lewis and he did.

Q. He did? A. Yes, he did.

Q. Now, do you know anything further about what Mr. Ragland did after that? Do you know he went on and made an investigation?

A. I knew nothing further of the investigation until I saw a copy of Mr. Ragland's report that was made out to Mr. Harkins.

Q. You don't know what the instructions from Mr. Lewis were, do you?

A. I do not know the instructions, no.

(Testimony of Browning Baymiller.)

Q. You don't know what he did after those instructions, do you?

A. His specific activities, I do not know.

Q. When did you first learn that he had the number of the aabeta co. in Bell?

A. Oh, I would say that was something like one, or possibly two days before the termination visit of Mr. Thompson and Mr. Ragland and [1029] myself.

Q. Isn't it a fact that Mr. Lewis told you that these rumors included and added to the fact that they had set up a business address in Bell, California, or thereabouts? A. No.

Q. Now, you have stated you were on an extended visit some place else on business, I believe, at the time these two plaintiffs were brought in and introduced to Mr. Harkins, is that correct?

A. I was, yes.

Q. How long did that visit continue, Mr. Baymiller, thereafter? I mean did you return to town shortly thereafter?

A. Well, that particular trip that I was on takes probably ten days. I don't know whether it was one day or nine days after they were in the office when I returned.

Q. You were back in town, I assume, somewhere around the end of the first week in January of '52?

A. No, I was back in town before Christmas.

Q. So that this introduction to Harkins must have been prior to Christmas? A. Yes.

(Testimony of Browning Baymiller.)

Q. Well, none of us have been able to fix that date exactly, so you have helped.

A. Well, I am glad that I was of some help.

Q. When you called Mr. Ragland into your office or met him upon his return, it was your purpose to apprise him of what you had done and to put him to work on this investigation, wasn't it? [1030]

In other words, you were pinch-hitting for him while he was out of town, I believe you said. You didn't use "pinch-hitting."

A. That is right. I made the three calls which would normally be Mr. Ragland's chore. I made them while he was out of town.

Q. And then he picked up and carried on the investigation? That was the purpose of you seeing him?

A. I repeat I was not on an investigation myself. He started the investigation upon his return.

Q. You talked to him to get him started on it, is that it? A. Yes, sir.

Q. To your mind was there any necessity for Mr. Ragland to get in contact with Messrs. Howard, Hoppe, Newport or Krause?

A. Not that I know of, no.

Q. There would be no necessity for it?

A. I don't know as he did.

Q. But you can figure out no reason why he should cover the same ground, can you?

A. No.

Q. Mr. Baymiller, I want to get it straight

(Testimony of Browning Baymiller.)

again, so far as you are concerned, so far as your testimony is concerned, there was only on difficulty and that is the plaintiffs doing business in Los Angeles?

There wasn't anything else concerned, was there?

A. That is all. [1031]

Q. That is all. I mean that is all there was to it.

Have you ever seen Mr. Ragland's report? I believe you stated——

A. Yes, I read the report back there at the time when it was presented, I believe, in January or—of '52.

Q. That was at the time Mr. Harkins told the three of you to go out and terminate, wasn't that it?

A. That was a few days—the report was a few days prior to that, yes.

Q. And you read it? A. Yes, I read it.

Q. What was the purpose, if you know, of Mr. Ragland investigating the Orange Coast College job?

A. I do not know. I am unable to answer that.

Q. What was the purpose, if you know, Mr. Baymiller, of Mr. Ragland investigating some rumor that these plaintiffs had stolen some documents from the Downer Company?

A. I didn't know he was investigating that.

Q. At least, you know of no reason for it, in connection with this? A. None whatsoever.

Q. I assume your answer would be the same in connection with the credit inquiry from Stanton

(Testimony of Browning Baymiller.)

Lumberyards, mentioned in his report, that had nothing——

A. I recall the casual mentioning of it, which I considered very insignificant.

Q. It was a matter he found—you can find no [1032] significance to it in connection with this question of whether or not they were doing business, the plaintiffs were doing business in Los Angeles?

A. No, absolutely not.

Q. Do you know anything, Mr. Baymiller, about the reason for not—in line with Mr. Thompson's statement at the termination meeting, that he would supply them tile for their commitments after termination? Do you recall that statement?

A. Yes, sir.

Q. Do you recall whether you testified that Flintkote complied with that with the exception, with the exception of two orders of tile, I believe, to the Lewis A. Downer Company of Riverside, is that right?

A. That is correct.

Q. Did you refuse that order or did Mr. Thompson?

A. No, I refused it.

Q. Well then, I can ask a direct question: Isn't it a fact that you refused that because you had heard from other acoustical tile contractors that was going on this Orange Coast College job?

A. No, sir.

Q. Isn't it a fact that you or Flintkote, to your knowledge, refused to supply Flintkote tile to this firm in Bakersfield because you found it was going on the Orange Coast College job?

(Testimony of Browning Baymiller.)

A. I know nothing about any refusal of a Bakersfield order. If that order is the same one, I didn't even know the [1033] order I turned down for Louie Downer through the plaintiffs here, I didn't even know what job that was. [1034]

Q. But my question was, you didn't know it was going to go on that job?

A. I didn't know it was the Orange Coast College job. I just saw it was a material sale and I had been instructed by my superiors not to accept anything except on their firm contracts.

Q. And you had no contact with any refusal to supply tile to Bakersfield which was going to be used on it?

A. No, I do not recall any contact at all on that.

Q. Do you know who got the Pacific Coast College job? A. I have no idea.

Q. Or who had it at the time?

A. I have no idea.

Q. Well, that brings us up to this termination meeting. As I recall it, your, Mr. Thompson and Mr. Ragland were all called into Mr. Harkins' office, the three of you? A. That is correct.

Q. And Mr. Harkins instructed the three of you to go out to the Bell address and notify these people that they could no longer buy Flintkote tile?

A. Yes, sir.

Q. That was your sole purpose in going out there?

A. That and to explain to them on the terms of how we were terminating them.

(Testimony of Browning Baymiller.)

Q. Did either you or Mr. Thompson ever contact either [1035] of the plaintiffs to get their story on the matter before you terminated them?

A. No.

Q. Your sole knowledge, or Flintkote's sole knowledge, then, were rumors and whatever information Mr. Ragland was alleged to have gotten by contacts out there, a visit out there? Whatever information you got from the defendant on the subject came from Mr. Ragland, is that right?

Mr. Black: You mean from the plaintiffs?

Mr. Ackerson: About the plaintiffs.

Mr. Black: You said from the defendants.

Q. (By Mr. Ackerson): About the plaintiffs came from Mr. Ragland's report, is that right?

A. Are you wanting to know the reason for the termination?

Q. No, I want to know whether or not either you or Thompson or Harkins ever contacted the plaintiffs directly in connection with this subject at all.

A. With the Bell operation?

Q. Yes.

A. We did not until we went down to terminate them.

Q. Well, now, did Mr. Harkins when he called the three of you in, that would be what, the sales manager, the assistant sales manager and the promotion man for acoustical [1036] tile, that was your respective titles, wasn't it?

A. That is right.

Q. And when Mr. Harkins called you in his

(Testimony of Browning Baymiller.)

office, did he make any statement or explanation as to why these three executives should go to the client to deliver this message? Was there any reason given?

A. You mean reason for sending the three of us?

Q. Yes.

A. I do not recall that he told the three of us to go. He instructed Mr. Thompson and Mr. Ragland and I believe that I was invited along by Mr. Thompson.

Q. But he called all three of you into the office that morning just before you left?

A. I am not too sure that we went directly that same day because Mr. Ragland had to make an appointment with the plaintiffs to be sure that they would be there.

Q. If Mr. Ragland's recollection was that he called for an appointment 30 minutes after this Harkins meeting and went out directly thereafter, would that refresh your recollection on it?

A. Well, that could be, that same morning or it could have been the next morning.

Q. Now is Flintkote accustomed as a matter of practice to initiate, effectuate a matter like cutting a client off, without any written notification? Is that a custom down [1037] there?

A. It isn't often that we have occasion to take such action.

Q. But you do have similar actions to take. Isn't it true you usually do it by a formal written

(Testimony of Browning Baymiller.)

notification? A. No, sir.

Q. That isn't true?

A. We do not have formal written contract agreements.

Q. No, you misunderstood me. Doesn't Mr. Harkins, as the principal boss on the West Coast here, usually sit down and in a case like this, for instance, and say, "aabeta company, this is to notify you you are terminated," or words to that effect? Wouldn't that be the way you would usually handle the matter? A. No.

Q. Did Mr. Harkins explain why in a matter of this importance that these plaintiffs shouldn't be called into his office to receive the instructions? Was that discussed?

A. No, that was not discussed.

Q. When you have something disagreeable such as this to discuss with a client, wouldn't that be the usual custom, to have them come to the mountain instead of the mountain going to the customer?

A. No, I wouldn't say that that would be the procedure.

Q. It wasn't in this case at any rate, was it, Mr. [1038] Baymiller? A. No, sir.

Q. Now you three arrived out there, you, Thompson and Ragland arrived out there, and I believe you had to wait about 30 or 35 minutes for Mr. Waldron to get in from wherever he was?

A. We had to wait a short time. I don't recall how long it was. [1039]

(Testimony of Browning Baymiller.)

Q. 20 or 30 minutes, wasn't it? It has been so testified to anyway.

A. Let that testimony stand, then. I don't remember.

Q. All right. What did you talk about with Mr. Lysfjord before Mr. Waldron arrived?

A. We did not talk about this particular subject.

Q. I know. What you really talked about was the acoustical tile job that was installed in the Bell plant at that time, didn't you?

A. In their office?

Q. Yes.

A. Yes, I believe it was discussed, recognizing the tile on the ceiling.

Q. And either you or Thompson or Ragland commented on, "Nice looking job," and so forth, didn't you? A. I believe so.

Q. And you killed time without mentioning a word of the serious matter until Waldron arrived?

A. Naturally.

Q. Then I believe you testified that Thompson immediately said that the Flintkote Company could no longer sell them acoustical tile?

A. That is correct.

Q. And you stated that either Lysfjord or Waldron said—and I am quoting from your testimony—"Do you really [1040] mean that we are no longer a Flintkote customer, that we can no longer buy?" And that Mr. Thompson answered, "That is correct."

Do you recall that testimony?

(Testimony of Browning Baymiller.)

A. Yes, sir, I recall that.

Q. There really wasn't much said about business in Los Angeles other than the fact, a mere statement of it by Thompson? I mean a mere reference to it? There wasn't any prolonged discussion about the do's or don'ts of it, was there? A. No.

Q. And you made another statement that after the meeting was over along toward the end of it in connection with these committed jobs and Flintkote being willing to fill those orders, you tacked onto that answer, "so that they would suffer no financial loss whatsoever by the severance of their relationship."

What did you mean by that?

A. I meant that we would fulfill the requirements of any contracts that they had on hand so that they would not suffer any financial loss due to having bid on Flintkote materials on the commitments that they had out.

Q. I thought that is what you must have meant. You meant they would lose no financial loss on those committed jobs? [1041]

A. We felt that that was all we would be obligated for.

Q. But you didn't mean that they would suffer no financial loss to their business at being terminated, did you?

A. Well, their other activities, for instance, their purchases of other products such as their purchases from E. J. Stanton, we had no connection or no interest in that whatsoever.

(Testimony of Browning Baymiller.)

Q. But, Mr. Baymiller, they hadn't made a purchase from anybody except Flintkote at that time and they didn't know they could at that time, did they? I mean, did they indicate or say anything that led you to believe that they had purchased or could purchase from anybody else at that time?

A. No, they did not.

Q. Well, then—— [1042]

Q. And you didn't mean that——

A. But they must have had other commitments on which they intended to use other products.

Q. You don't—you knew at that time, of course, that they had quit rather lucrative positions to go into this business, didn't you?

A. I had no idea how lucrative their positions were.

Q. You knew they had a regular position?

A. Yes.

Q. You knew that they had committed themselves to warehouses and regular business expenses, establishing two offices?

A. I knew they had committed themselves to the San Bernardino warehouse, but not the Bell warehouse.

Q. But you did at the time you made this statement of financial damage, you were in it? You were in it admiring the acoustical tile in there?

A. I was in it.

Q. Yes. A. I was in the front office.

Q. Yes. You were asked the question by Mr. Black, substantially to this effect: Do you recall

(Testimony of Browning Baymiller.)

either of the plaintiffs stating or any conversation relating to pressure from acoustical tile contractors?

And your answer, similiar to a previous one, said, "I [1043] don't recall the word 'pressure.'" Do you recall that?

A. I recall that question, yes.

Q. Well now, isn't it a fact that Mr. Waldron did, whether he used the word "pressure" or not, state that the compulsion or the force or the persuasion, or something from the acoustical tile contractors, must have been terrific to make Flintkote do this thing? Didn't he voice that thought to you personally, Mr. Baymiller ?

A. No, he did not voice it in that respect to me.

Q. In what respect did he voice it to you?

A. He merely casually mentioned that he had suspicion of a compulsion by other contractors, and I believe Mr. Thompson answered that by saying that that had no bearing whatsoever in determining the severance of this relation.

Q. Isn't it true that you yourself stated to Mr. Waldron, "Yes, there has been pressure"? Do you recall using that?

A. I do not recall making that statement.

Q. Now, Mr. Black asked you, and he used the word "specifically," and I think it is on page 985 of the transcript, Mr. Black, that you were specifically asked:

"Q. Did Mr. Thompson say he was sorry he had to make this decision because he was ordered to do so by higher-ups in the company?"

(Testimony of Browning Baymiller.)

Your answer was, "He could have phrased it in those [1044] words but I do not recall his exact words."

Now, Mr. Baymiller—

Mr. Black: Just a moment. It is hardly fair to ask him that question, without the next one. The whole thing comes in one package here.

Mr. Ackerson: I know you repeated the question, Mr. Black, but I wanted his first answer.

Mr. Black: He is entitled to have his entire answer, I submit.

Mr. Ackerson: Well, I will read the whole thing.

Q. (By Mr. Ackerson): You were asked the question, and I will start on the prior page, Mr. Black—I will have to start ahead of that.

"Q. Do you know whether anything was said by anybody at that meeting about pressure from other contractors?"

That is line 21.

"A. No, sir.

"Q. Is it that you don't recall it or that you state that that did not happen?"

"A. I don't recall. I am sure the word 'pressure' was not used.

"Q. Do you recall whether anything was said by you, Mr. Ragland or Mr. Thompson about the matter of authority to make this decision, or higher-ups, or superiors, or anything of that general tenor? [1045]

"A. I do not recall a conversation of that nature.

(Testimony of Browning Baymiller.)

“Q. Specifically did Mr. Thompson say that he was sorry he had to make this decision because he was ordered to do so by higher-ups in the company?

“A. He could have placed it with those words, but I do not recall his exact words.

“Q. Do you have any recollection of anything being said on that score? A. No, sir.”

Mr. Ackerson: Is that sufficient, Mr. Black?

Mr. Black: That is all right.

Q. (By Mr. Ackerson): Now, Mr. Baymiller, you do recall, do you not, that the subject was brought up? I think you have so stated today?

A. What subject?

Q. The subject of influence or objection on the part of contractors.

A. In the office—I will tell you in the office there was conversation in the office. Then the two plaintiffs followed us out to the car, when we started to leave, and we had additional conversation out at the curb.

Q. So there may have been conversation, this may have been at the curb?

A. It could have been out there at the curb as we left in the automobile. [1046]

Q. It could have been either place then, is that it, or is it your recollection it happened at the curb?

A. Well, I do not believe it happened in the office.

Q. All right. I just have one or two other questions, Mr. Baymiller.

(Testimony of Browning Baymiller.)

I want to call your attention to this Owens roof job, and I believe you stated your personal knowledge of it was very limited. Anderson came in your office, your own salesman Anderson said they wanted to buy some tile.

You referred them to Howard.

A. I called R. E. Howard and got a price for Anderson to give to Owens.

Q. And gave it to Anderson?

A. Gave it to Anderson.

Q. You never did go out to Mr. Ragland's desk, did you, in connection with the Owens roofing job?

A. No.

Q. You did know, however—or you do know now, at least, that Mr. Ragland took these two plaintiffs or one of them, at least, down and aided them in getting that job?

A. I only know by Mr. Ragland's testimony.

Q. That was the first you heard of it?

A. That was the first I knew of it.

Mr. Ackerson: That is all, Mr. Baymiller.

Mr. Black: That is all. [1047]

(Witness excused.)

Mr. Black: I am going to call a witness out of order, if the court please. I am calling Mr. Hoppe at this time as he has to go East early next week. I would like otherwise to proceed with our own people.

The Court: How long is this case going to last?

Mr. Black: I hope to bring it to a conclusion very soon.

The Court: I understood that it would be at most 10 days. Of course, we are not working four-hour days, which are the conventional court days, but we are working more than half days.

Go ahead with your witness.

I was thinking of the other commitments of the court. If the case is going to take a great deal of time longer we will have to work Saturday or work longer into the afternoon.

ARTHUR D. HOPPE

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated? Your full name, sir?

The Witness: Arthur D. Hoppe.

Direct Examination

By Mr. Black:

Q. What business are you engaged in, Mr. Hoppe? [1048]

A. I am engaged in the lathing and plastering contracting business in this city since 1921. In the acoustical tile application and engineering business since 1937.

In the plastic business for six years until last week. And I operate a ranch near Modesto, California, sir.

(Testimony of Arthur D. Hoppe.)

Q. What company, if any, are you connected with?

A. The A. D. Hoppe Company, the Sound Control Company, that is, the acoustical tile end. Both of those are separate corporations, sir. And the ranch is the Country Royal Rancho.

Q. How long has Sound Control Company been a corporation?

A. I hate to give specific dates, I believe, sir, August 1, 1953.

Q. How was that business conducted prior to its incorporation?

A. That business was then operated as A. D. Hoppe, an individual, doing business as the Sound Control Company, a registered fictitious name.

Q. You were the person in charge of it?

A. I was the sole owner, sir.

Q. Sole owner of it. Was that the situation in the fall of 1951, Mr. Hoppe?

A. That is correct, sir.

Q. Did that continue through until the spring of '52? [1049]

A. That is right, sir.

Q. In connection with your acoustical tile business, what line of tile did you handle?

A. From 1937 until the time that I made a connection with The Pioneer-Flintkote I was exclusive distributor for the National Gypsum Company product known as the Gold Bond line, sir. [1050]

Q. And did you continue to carry that tile along with your Flintkote tile when you were carrying Flintkote tile?

(Testimony of Arthur D. Hoppe.)

A. It was specifically understood by the Pioneer people that I was augmenting the National Gypsum line, which was limited in scope as, for instance, if any of the people here understand the acoustical business, we are restricted to tile to only a $\frac{3}{4}$ -inch thickness. There ar many calls for larger sizes and larger thicknesses in tile which they could not furnish and which I could get from the Pioneer-Flintkote people.

Q. How long did you continue to handle Pioneer-Flintkote tile?

A. I handled it—I cannot give you the specific date, sir—I believe it was sometime in late April or May that they came to my office and told me—I do not want to put words in their mouth, sir—but to the effect——

Mr. Ackerson: Your Honor, I am going to object to this. This is hearsay.

Mr. Black: It is what the Flintkote people told him.

Mr. Ackerson: What Flintkote said to Mr. Hoppe is hearsay.

Mr. Black: It is not used in any hearsay sense. It is just to narrate the circumstances under which he ceased operating for the Flintkote people. It seems to me we are entitled to prove that. [1051]

Mr. Ackerson: It is objected to on the ground of hearsay.

The Court: Overruled.

The Witness: Would you repeat the question?

(Testimony of Arthur D. Hoppe.)

Mr. Black: Would you mind reading back the question, Mr. Reporter.

(The record referred to was read by the reporter, as follows:)

“Q. How long did you continue to handle Pioneer-Flintkote tile?

“A. I handled it—I cannot give you the specific date, sir—I believe it was sometime in late April or May that they came to my office and told me—I do not want to put words in their mouth, sir—but to the effect——”

Q. (By Mr. Black): Now will you continue with your answer?

A. To the effect that we were not giving them enough volume to warrant the continuation of our franchise.

I told them that I had spent a good deal of money in developing the tile, having architectural contacts, and so forth, but mine was only a verbal agreement with them. They did permit me to complete some contracts that I had on the books but they felt they could place the business to their better advantage otherwise and I felt I had no [1052] recourse, sir.

Q. During the course of your business operations with Sound Control Company, and specifically in the early part of 1952, did you have any information about the operations of a company called the aabeta company?

A. One of my salesmen—you understand I was

(Testimony of Arthur D. Hoppe.)

not as close to my business, sir, as a lot of employers possibly are, and I possibly should have been—but one of my people came in and said that there is a new firm called—I don't know whether he called it the aabeta company or the aabata company—and, as I recall, I remarked, that isn't unusual, there are 25 or 30.

Q. What, if anything, did you have to do in connection with that aabeta company operation?

A. Nothing whatsoever.

Q. Did you have any discussions following that with the Flintkote people?

A. I do not recall any. Mr. Baymiller testified today that he came to my office. I do not recall that. He may have called on one of my men.

Q. Did you have any discussion with any other Flintkote distributor with respect to the aabeta company's operations?

A. Oh, scuttlebutt, yes, wondering how many applicators we might wind up with.

Q. Did you make any direct complaint to Flintkote with [1053] respect to that?

A. Never in my life.

Mr. Ackerson: Just a moment. I move that that be stricken, your Honor, both the question and the answer, as calling for a conclusion.

The Court: What was the question?

(The record referred to was read by the reporter, as follows:)

(Testimony of Arthur D. Hoppe.)

“Q. Did you make any direct complaint to Flintkote with respect to that?

“A. Never in my life.”

Mr. Black: That is exactly what was charged.

Mr. Ackerson: He may state what he said but I submit it is a conclusion. I don't know what Mr. Hoppe may mean by a complaint.

Q. (By Mr. Black): Put it this way: Did you have any communication yourself with the Flintkote people with respect to the operations of the aabeta company in the Los Angeles area?

A. I did not, sir.

Q. Did you attend any meeting of the acoustical tile contractors to protest the operations of the Flintkote people in this area?

A. Are you talking about the acoustical tile contractors association, sir? [1054]

Q. No, I am talking about the Flintkote, the people that handled Flintkote products, the acoustical tile contractors.

A. Mr. R. E. Howard was in my office one day and he said he had heard that there was another company called the aabeta company, whom I had previously heard about from one of my employees, who was figuring tile in the Los Angeles area.

I said I thought they were restricting that to three. I hope they do not get any more.

Q. Did you attend any other meeting other than the meeting just between you and Mr. Howard on that subject? A. No, sir.

Q. At any time?

(Testimony of Arthur D. Hoppe.)

A. I have never been in the Pioneer-Flintkote's office.

Q. Or at any other place? A. No, sir.

Q. Did you ever hear Mr. Howard make any threat to the Flintkote Company to boycott them if the aabeta company would not stop?

A. I did not, sir.

Q. Did you ever make such a statement yourself? A. I did not, sir.

Q. Did you ever hear of Mr. Newport making such a statement? [1055]

A. Only in the courtroom today by innuendo.

Q. At that time you had no knowledge of that statement?

A. Until today I had no knowledge of that statement.

Q. Was your organization engaged at that time in a price-fixing arrangement with other acoustical tile contractors? A. We were not.

Q. Did you have any program for allocating bids among the acoustical tile contractors in this area?

A. I did not.

Q. Did you ever tell The Flintkote Company that such a situation existed?

A. I could not have because such a situation to my knowledge did not exist.

Q. Did you ever ask anyone in The Flintkote Company to agree to discharge the aabeta company from their connections with the Flintkote Company?

Mr. Ackerson: Objected to as a conclusion, your

(Testimony of Arthur D. Hoppe.)

Honor. He ought to state what he said and what they said. I don't know whether he asked for an agreement or not until I know what he said.

The Witness: Will you repeat the question, sir?

The Court: The objection is overruled. But he should state what he said if he did make any such request.

Let's just have the language, if possible; if not, the—— [1056]

Mr. Black: Would you repeat the question, Mr. Reporter?

(The question referred to was read by the reporter, as follows: "Q. Did you ever ask anyone in The Flintkote Company to agree to discharge the aabeta company form their connections with The Flintkote Company?")

The Witness: I did not.

Q. (By Mr. Black): Did you ever hear any acoustical tile dealer in your presence make such a request of anyone in The Flintkote Company?

A. I did not.

Mr. Black: I believe that is all, Mr. Hoppe.

Mr. Ackerson: Just some very few questions, Mr. Hoppe.

The Witness: Thank you.

Cross-Examination

By Mr. Ackerson:

Q. I just want to get it clear. You handled National Gypsum tile from 1937 to the present date?

A. That is correct.

(Testimony of Arthur D. Hoppe.)

Q. And I take it that that was your main line of tile?
A. It was, yes, sir.

Q. And you stated that you used Flintkote only in instances where National Gypsum didn't make the sizes or the [1057] types that you needed, is that right? It was a supplementary line really?

A. It was a supplementary line but in order to endeavor to hang onto the needed line I used a lot of their tile that naturally I needed until I was reprimanded by National and jacked up by these people. They all want volume, all they can get.

Q. But you needed Flintkote only to supplement your National Gypsum line, is that correct?

A. I needed the Flintkote in order to stay competitive in the market, sir, more than a supplementary item.

Q. Very well.

Since you were terminated by Flintkote, have you substituted your requirements that were formerly filled by the Flintkote line or has National Gypsum, or at that time had National Gypsum, come into the field to fill out the line?

A. No, they still do not have a full line, and I have to supplement it—we are limited to not bidding jobs that we cannot furnish with National Gypsum tile, or buying it on the market from lumber dealers or other acoustical contractors. Actually at no great premium in price.

Q. Who do you buy it from, Mr. Hoppe?

A. I have bought some material I think from—

(Testimony of Arthur D. Hoppe.)

you understand I am not the detail man in my office——

Q. Do you know actually? [1058]

A. I have bought material from Coast Insulating Company. Largely that is insulating material, not acoustical tile.

Q. And Howard also?

A. I may have bought a few pieces of mineral, a few orders of mineral tile from Mr. Howard, but no fiber tile.

Q. But generally you get it from the acoustical tile contractors who have it, don't you?

A. Or lumber dealers. It isn't a large volume. We just don't bid the jobs that we are not—we go out and sell National where we can.

Q. And if you have a large enough job and National doesn't supply it, you don't bid them, is that what you started to say?

A. Generally speaking, sir, yes. There is a lot of items in a large job that National does furnish. We only have to augment it with small quantities of other material, if that classifies it.

Q. That is the general situation. That is what I wanted, Mr. Hoppe. A. Thank you.

Q. Now, Mr. Hoppe, who is your general manager out at Sound Control?

A. We do not have such a title.

Q. Were you running the business pretty much yourself at that time? [1059]

A. In 1950, '51, I was closer to it than I have been since.

(Testimony of Arthur D. Hoppe.)

Q. How about '52?

A. I lost this account early in '52.

Q. You say it was early in '52 when you lost it?

A. I believe it was in '52 that my franchise was cancelled, sir.

Q. Mr. Hoppe, isn't it a fact that you did talk with either Harkins or Lewis—do you know Mr. Harkins, by the way?

A. I have never met Mr. Harkins.

Q. Have you ever met Mr. Lewis?

A. Not to my knowledge, sir.

Q. How about Mr. Thompson?

A. I met Mr. Thompson outside in the hall today.

Q. Mr. Thompson you know is general sales manager for Flintkote?

A. I am sorry, sir. I did not know that until this moment, if that is a fact.

Q. Do you know Mr. Baymiller?

A. Yes, I know Mr. Baymiller.

Q. You have know him for a long time, haven't you? A. Since about 1950, '51.

Q. And back in '51 or '52, I assume you knew Mr. Ragland? He was the salesman? [1060]

A. Not well. He was in my office a few times.

Q. He came to your office?

A. Bear in mind that I also was operating in Whittier and was not in my office at times when sales personnel would call.

Q. That is what I asked on the previous question. Who was in your office when you weren't there? Who carried on the busines for you?

(Testimony of Arthur D. Hoppe.)

A. Whichever of the salesmen were in or else messages are left with one of the girls in the office, sir.

Q. Now I am going to ask you the question, Mr. Hoppe: Isn't it a fact that to one representative of Flintkote you threatened to cancel the line in view of these people engaging in business in Los Angeles?

A. I did not, sir. [1061]

Q. You stated that Mr. Howard came over to your place of business and advised you of—I believe you said one of your employees advised you they were doing business, the plaintiffs were doing business in Los Angeles? Was that your testimony?

A. That is correct.

Q. Then subsequently Mr. Howard spoke to you about it?

A. Mr. Howard dropped by my office, I believe. My office, sir, is on Riverside Drive. Mr. Howard's was way across town. He had been in the Valley and dropped by my office. He used to be a lather and he worked on plastering jobs for me. We were good friends.

He dropped by my office and said he understood this new aabeta outfit, had I heard of them.

I said yes. But until today I have not had the pleasure of metting either one of them, sir.

He said he understood they were figuring Pioneer-Flintkote.

I said, "Gee, I thought there were only three of us. I hope they don't scatter it to the winds," or words to that effect.

(Testimony of Arthur D. Hoppe.)

Q. Is it a fact, though, isn't it, neither of you were very happy about having another competitor in the area, were you?

A. We never welcome—we have enough without welcoming [1062] it sir. They come in whether they are welcome or not.

Q. These people didn't stay in very long, Mr. Hoppe.

Mr. Hoppe, you stated that you had never attended meetings of acustical tile contractors relative to price-fixing or allocation.

A. I never did, sir.

Q. Did you ever send a representative to such a meeting? A. I did not, sir.

Q. Never? A. Never.

Q. Never from 1950 to date?

A. Not to date did I ever send a man to any price-fixing meeting of any nature, and I have not since I was in business since 1921.

Q. Is there any way The Flintkote Company could base a bid on a Sound Control figure, without having been supplied that Sound Control figure in advance of the bid?

Mr. Black: Just a moment. That question is—was that, is there any way that Flintkote could—

Mr. Ackerson: Does he know any way.

Mr. Black: Flintkote?

The Court: The question called for a conclusion.

Mr. Black: Flintkote is bidding? Is that the question?

Mr. Ackerson: I beg your pardon?

(Testimony of Arthur D. Hoppe.)

Mr. Black: I just don't— [1063]

Mr. Ackerson: I beg your pardon.

The Court: Well, we will try again after recess.

Mr. Ackerson: Let's try it again.

(Short recess taken.) [1064]

Mr. Black: Resume the stand, Mr. Hoppe.

A. D. HOPPE

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Ackerson:

Q. Mr. Hoppe, you have an entertainment room in the bottom of your home, don't you, like a rumpus room? A. Yes, sir.

Q. Isn't that affectionately known as Hoppe's cellar?

A. I have never heard it called by that name in my life, sir.

Q. I thought maybe you named it that, Mr. Hoppe.

You stated just before the recess that you had never attended, or did you say you had never known, of a meeting of acoustical contractors in which prices were discussed?

A. Oh, no, sir.

Q. You didn't say that?

(Testimony of Arthur D. Hoppe.)

A. Oh, no. No, I said at which price fixing was arranged. There is a world of difference between discussing prices and fixing prices, sir.

Q. But you have attended meetings, I take it, where prices were discussed, then, as distinguished from fixing prices, in your mind?

A. Oh, yes. You can't have two contractors together in [1065] any line of business where prices are not discussed, and mostly cussed and discussed, sir.

Q. And then you have attended meetings I assume of acoustical contractors?

A. I have attended many meetings where acoustical contractors were there, yes.

Q. They were acoustical contractors' meetings, I mean.

A. Yes, I have attended many meetings of the acoustical contractors' association, not many but several.

Q. And at some of these meetings you discussed prices, is that right?

A. I think mostly before and after meetings prices were—as I say, you can't get contractors together without discussing prices. For me to say I didn't discuss prices would be absurd, sir.

Q. What was the general purpose of these contractors' meetings, Mr. Hoppe?

A. The contractors' meetings were held—I think the minutes of the contractors' association are open to you, sir—they were made primarily to be as strong a front as possible to labor and negotiations

(Testimony of Arthur D. Hoppe.)

and I believe, sir, at the request of the negotiating bodies. They wanted us to be in a group rather than to deal with us as individuals, sir.

Q. You say that was the main purpose?

A. That was the main and, as far as I know, the primary [1066] purpose. It is a non-profit corporation, sir.

Q. Yes. But you stated at these meetings prices were discussed, didn't you?

A. I didn't state specifically they were discussed. I said that I can't imagine a meeting of contractors where prices are not discussed.

Q. Then I will ask you the direct question: Were they discussed, were prices discussed?

A. They couldn't have been—I can answer that now directly—I can tell you that I think probably they were. I just can't imagine a meeting of contractors where prices did not come into the discussion.

Q. Yes. Now do you recall——

A. Whether there are two or 20, sir.

Q. Yes. And do you recall, Mr. Hoppe, when you didn't attend these meetings you had a representative attend these contractors' meetings?

A. No, sir.

Q. Did you ever have Mr. Smith, who brought the documents up the other day, attend those meetings?

A. Not to my knowledge, sir.

Q. You don't know that he ever attended one?

A. I do not, sir.

Q. Do you recall——

(Testimony of Arthur D. Hoppe.)

A. Now I don't say that he didn't, I say if he did I [1067] didn't know it.

Q. I understand. A. Thank you.

Q. You stated, I believe, that you ceased handling Flintkote tile somewhere the first part of '52, and with that date in mind, and only for the purpose of using the date, do you recall a meeting of representatives of acoustical tile contractors held in your home in this amusement room?

A. We might have had an association meeting in my room. In fact, I think we did. We met at various homes.

Q. You had one about that time, do you recall?

A. I do not recall.

Q. But you do recall having them in your home?

A. I have had some, or several at home. I do not recall a stated meeting. That could or could not have been.

Q. Do you recall along about that time that a Mr. Granni used to attend those meetings for Acoustics, Inc. ?

A. I do not recall Mr. Granni ever attending a meeting in my home. Is that the question?

Q. Yes. Let's limit it to these meetings in your home.

A. I do not recall of his being there, sir.

Q. Do you recall a Mr. Howard—and I think they used to refer to him by the nickname of Bugs Howard—do you know who that is?

A. I never heard of a Mr. Bugs Howard to my knowledge. [1068]

(Testimony of Arthur D. Hoppe.)

Q. Did you ever hear of a Mr. Howard representing the Coast Insulating Products Company?

A. No, sir. [1069]

Q. Did you ever recall his being in your home at one of these meetings? A. No, sir.

Q. How about a Mr. Anthony Wellman, who was then in '52 representing the R. E. Howard Company, was he ever in your home at one of those meetings? A. Not to my knowledge.

Q. How about Mr. Bill Arthur, was he ever in your home?

A. Mr. Bill Arthur—now you are getting—Mr. Bill Arthur was employed by me. I cannot tell you the year, and he was in my home divers times.

Q. At one of those meetings?

A. Not that I recall.

Q. Mr. Bill Arthur worked for Shugart at the time I am talking about, in '52, I believe.

A. As to that, I couldn't testify as to the time he worked for the Shugart Company, sir.

Q. Was he in your home? You stated he has never been in your home at one of those meetings?

A. Not to my knowledge.

Q. How about Mr. Arnett of the Downer Company?

A. Yes, I believe he used to represent the R. W. Downer Company at some of those meetings after the senior Mr. Downer died. I can't give you the date, sir.

Q. Did he attend any of these meetings, in your home? [1070]

(Testimony of Arthur D. Hoppe.)

A. You speak as though there were many meetings. He attended a meeting, yes. I think I recall his being there.

Q. A meeting. How about Mr. Smith of your company? You stated he did attend those meetings?

A. I stated he did not attend meetings if I were there. He certainly wasn't there if I were there. There would be no need for us both to be there.

Q. He didn't attend any meeting in your home?

A. There was no meeting at my home unless I attended, sir.

Q. How about Mr. Gustav Krause of Coast Company?

A. Yes, Mr. Krause has been in my home, both at and not at meetings.

Q. You don't recall whether he attended this meeting—did you hold these meetings somewhere around '52 and '51?

A. I cannot give you dates, sir.

Q. You probably—

A. I would say possibly in that span of '51, '50, '51, '52, there was probably a meeting of the group at my house, yes, sir. But I wouldn't want to swear to that.

Q. Well, very well. The best of your recollection—

A. Yes.

Q. —that is right? A. Yes.

Q. Did you attend any of the meetings at a time when [1071] a Mr. Hollenback or Hollenbeck was there officiating or attending the contractors' meet-

(Testimony of Arthur D. Hoppe.)

ing? It was before the incorporation of the Association back in '51 or '50. Did you attend any of those dinner meetings?

A. With Mr. Hollenbeck? No, sir.

Q. He was an estimator, if it will help you. I think he was reviewing estimates.

A. I recall there was some sort of—in the meetings of the Association discussions came up about a wide diversity in the footage of figures.

As I recall, Mr. Hollenbeck worked with other groups in quantity survey work and for a short time he was—I can't tell you how long—some of the sales engineers of the various companies, nor can I tell you whom from my company went, sir, attended a few meetings where they took off on sample jobs, as to how many feet they would get and how you would do it and how you would set it up in an attempt to equalize quantities, takeoffs. Do I make myself clear, sir?

Q. I think so. Wasn't it true, Mr. Hoppe, that a part of Mr. Hollenbeck's duties was to determine, after looking at the contractor's actual bid on a job, who was low, who was next and who was next, and make the decision on the basis of quantity takeoffs, who was actually low bidder and who was second low bidder? [1072]

A. If that is true, it was without my knowledge and consent, and I wouldn't have any part of it.

Q. You don't know that that was done.

A. I wouldn't say it wasn't done, it couldn't

(Testimony of Arthur D. Hoppe.)

have been done without my knowledge, I don't think, and I would have no part of it, sir.

Q. Would you say, to your knowledge, Mr. Hollenbeck, as a duty with the group, did not disqualify the low bidder and award the job to what he decided was the second low bidder?

A. I know nothing of anything of that nature nor would I have had any part of it. If I am low on a bid, Mister, I want it.

Q. I am going to see if I can ask a question I started to before recess, Mr. Hoppe, without mixing the thing up.

I started to ask you, if, as an acoustical tile man, you knew of any way in which, say, the R. W. Downer Company could base its bid on a particular job on the figures bid by Sound Control, without Sound Control first supplying that bid to Coast.

Do you follow me?

A. Will you ask me one specific question, sir, and I will attempt to answer it.

Q. Did you ever supply the bid figure for Sound Control to the Downer Company in advance of the awarding of the bid?

A. I never supplied any competitor with any of my [1073] figures prior to the awarding of a bid.

Q. Does that statement go to your employees?

A. That I cannot say, sir.

Q. You don't know whether your office——

A. If they had done that they would no longer be employees, sir.

(Testimony of Arthur D. Hoppe.)

Q. Your statement is then that you know nothing about it?

A. I know nothing about it.

Q. We have had some documents here introduced for identification, and it has been testified that this bid under a bid allocation scheme in effect at the time, in 1951, was allotted to Sound Control.

Now, we turn over here and this is the way the testimony said it was allotted:

They said that these were your figures in pencil here, 74.48, 8.59, 197.42.

That those figures were supplied to Downer and that Downer, who was not supposed to get the bid, automatically raised their figures to, 74.48 to 78.51, and so forth down the line, so that the allotment of the job to you would fall to you without any competition.

Do you know anything about such a scheme?

A. I know absolutely nothing about it and those are not my figures. [1074]

Q. You mean you didn't write them?

A. You said those are your figures, and I say they are not my figures.

Q. You mean you did not write them.

A. I did not write them and I know nothing of them.

Q. Do you know anything of the job from memory now? Do you know whether you got the Lakeview School job?

A. I do not know from memory if I did. If I

(Testimony of Arthur D. Hoppe.)

did and it has been testified I did, it is probable we did. I couldn't tell you the names of the jobs we did.

Q. Sometimes the best laid plans go awry. It has been testified you were supposed to get it.

You know nothing about it?

A. I know absolutely nothing about it.

Q. Who else in your office would know something about it? A. I don't know.

Q. Something about matters of that kind.

A. To my knowledge they would know nothing about it.

Q. Do you know Mr. Ollie Granni personally?

A. Yes.

Q. Do you know Howard of Coast at this time, '50? A. I don't know Mr. Howard of Coast.

Q. You know Tony Wellman?

A. Tony Wellman, I believe, is an estimator, freelance, [1075] I believe.

Q. I believe you stated Bill Arthur used to work for you. You know Mr. Arthur? A. Yes.

Q. Do you know Mr. Arnett? A. Yes.

Q. Mr. Smith, who works for you?

A. Yes.

Q. You are well acquainted with Mr. Krause?

A. Yes. [1076]

Mr. Black: Thank you, Mr. Hoppe.

We will call Mr. Thompson next, if the court please.

Mr. Hoppe: Your Honor, may I now leave the courtroom?

(Testimony of Arthur D. Hoppe.)

The Court: Does anyone wish this witness any further?

Mr. Black: Not as far as I am concerned.

Mr. Ackerson: He may be excused.

The Court: Apparently not. You may go, Mr. Hoppe. Thank you for coming in.

E. F. THOMPSON

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: E. F. Thompson.

Direct Examination

By Mr. Black:

Q. What is your present occupation, Mr. Thompson?

A. I am the sales manager for the Southwest District, the Pioneer Division of the Flintkote Company covering building materials.

Q. How long have you held that position?

A. Since October, 1946.

Q. Have you held it continuously from that time to the present? A. Yes, sir.

Q. Then I take it you were acting in that capacity for [1077] the Flintkote Company during the period commencing in the summer of 1951 and running into the spring of 1952? A. Yes.

Q. And you have been more or less continuously at the Flintkote office during that period?

(Testimony of E. F. Thompson.)

A. Yes.

Q. When did you first hear of the plaintiffs?

A. I first heard of them during the summer or fall of 1951, I believe it was.

Q. And were their names brought to you in the ordinary course of your business?

A. They were brought to me by Mr. Ragland and Mr. Baymiller as prospective customers.

Q. What, if anything, was suggested by either of those gentlemen in connection with the plaintiffs that you could do?

A. Well, in general, they were mentioned as possible customers in the application of acoustical tile and they wished to go into that business and use our material.

Q. Was anything said to you with respect to arranging an appointment with you to interview these people?

A. Yes. After preliminary talks by Mr. Ragland and Mr. Baymiller I was asked to talk to them.

Q. And was such a meeting arranged?

A. Yes. [1078]

Q. Where did you first meet them, Mr. Thompson?

A. I believe the first time I met them was at the Manhattan Supper Club at lunch.

Q. Can you place the time of that meeting?

A. Well, it would be in the fall of 1951. I can't give you even the month.

Q. Who was present?

(Testimony of E. F. Thompson.)

A. Mr. Baymiller, Mr. Ragland, the two plaintiffs and myself.

Q. Mr. Thompson, we have been through this story with other witnesses a good many times, but I will repeat the same admonition to you. I am about to ask you for the substance of the conversation that was had at that meeting. Please, so far as possible, give the substance of what was said in contradistinction to conclusions about the net result or effect or purpose of the conversation, realizing that at this date I can hardly expect you to reproduce word by word what was said.

Please tell, according to your best recollection, what was said at that meeting, who said it and who replied to it as best you can give it from your own recollection.

A. Well, I would like to preface it in this way: I was there to determine the possibility of selling material to these gentlemen, and therefore I asked them for the following information: [1079]

First, to determine their ability to perform contracts using our material. I asked them directly if they had been in that business, and for how long.

They told me the number of years involved.

They also told me the type of work that they had performed in the past.

They brought some designs, as I remember it, to prove their ability, which was acceptable so far as I know.

I inquired actually into their financial ability to perform contracts.

(Testimony of E. F. Thompson.)

That in substance was the purpose and the way the meeting developed.

Q. Was there any discussion that you can recall with respect to territories in which this proposed operation was to take place?

A. Well, there were various territories discussed, and I recommended that this venture be established in the San Bernardino-Riverside area primarily because I needed more Flintkote Company distribution in that area. Also that it appeared to be a territory in which there was enough business to support a contractor of that type.

Q. Was anything said according to your recollection about operating in the Los Angeles metropolitan area? A. Yes.

Q. What was said and by whom? [1080]

A. The question put, as I remember it, was that the——

Q. Who put the question, if you know?

A. Well, probably one of the plaintiffs. I don't know which one. I would say that one of them asked, what could be done if they secured a contract in the Los Angeles area. And my answer was that it could not be handled except under special arrangement which would have to be worked out if such a thing was brought up, that we could not accept additional contractors and representation in the Los Angeles area.

Q. Do you recall whether anything was said at that meeting with respect to hauling materials into the Los Angeles area from some other point?

(Testimony of E. F. Thompson.)

A. I don't remember anything of that nature.

Q. Do you recall any discussion at that meeting, Mr. Thompson, about potential clients by other applicators?

A. No, I don't.

Q. Do you recall Mr. Waldron stating that the dealers were organized, that they weren't competing with each other any more?

A. I have never heard of such a thing. [1081]

Q. I take it your answer is that—

A. No, I have not.

Q. Mr. Waldron did not make such a statement?

A. I don't remember his making a statement like that.

Q. Was there any discussion about pressure from other acoustical dealers at that meeting?

A. Not that I recall, no.

Q. Do you recall anything with respect to Flintkote not being or being intimidated by pressure or coercion?

A. I don't remember anything of that discussed.

Q. Is there anything else at that meeting I have not covered that you now recall that has a bearing on this operation by the plaintiffs?

A. Well, I could tell you my own ideas, if that would—

Q. If it is your idea of what is your recollection.

A. Yes. I was favorably impressed with the gentlemen, as to their ability and their apparent willingness to operate in the outside area, San Bernardino-Riverside area, and also it was discussed the possibility of their operating in Las Vegas,

(Testimony of E. F. Thompson.)

Nevada. We proposed that they solicit business there, where we had no representation.

But other than that, and asking for a financial statement, and telling them that we would arrange further discussions with Mr. Harkins, that is the highlight of the meeting, or the total. [1082]

Q. What was your next contact with the plaintiffs or either of them following the meeting at the Manhattan Supper Club?

A. The next talk I had with them—the next time I saw them was when they came to our office to talk to Mr. Harkins.

Q. Did you personally see them at that time?

A. Yes.

Q. What did you do on that occasion?

A. I took them into Mr. Harkins' office and introduced them, and sat down with them.

Q. Can you recall what was said at that meeting by Mr. Harkins or by you or by the plaintiff?

A. Well, I repeated to Mr. Harkins my conversation with him prior to that time, that I had talked to these people and that they were willing to start a venture in the Riverside-San Bernardino area. That we needed representation in that area, and I felt they were capable of looking after a small territory and they were to bring a financial statement with them, and I would like his consideration.

Q. What did Mr. Harkins state at that meeting?

A. Mr. Harkins asked the gentlemen if they had

(Testimony of E. F. Thompson.)

made a survey of the territory which they said they had.

He asked them if they had good reason to believe their venture would be successful. They said they felt it would be. [1083] But there was a great deal of business in that area that could be handled locally, rather than importing applicators of acoustical tile from the Los Angeles area.

The felt, in operating there, they could make enough money in their venture to make it worthwhile.

He gave them some good sound business advice as to collections and so on. It was rather a short meeting, I would say, lasted a half hour.

Q. Do you recall anything else significant that was said, that you haven't told about, at that meeting? A. No, sir, I don't.

Q. What happened after that meeting broke up?

A. After that meeting broke up Mr. Ragland took the plaintiffs in to see Mr. McAdow, our credit manager, to present their financial statement, and I returned to my office and didn't see them again.

Q. Did you next, or, when did you next have anything to do with respect to the plaintiffs?

A. The next time I had anything to do with them was when I attended, or when I went to the termination meeting.

Q. Prior to that, did you have any office conference on the subject?

A. Yes. After it had been determined that they were in business in the Los Angeles area, we dis-

(Testimony of E. F. Thompson.)

cussed it with Mr. Baymiller and Mr. Ragland, and Mr. Harkins. [1084]

Q. Was that the first information you had had they were doing business in the Los Angeles area?

A. Well, it was reported to me by Mr. Baymiller that was the case.

Q. Prior to that you had no personal knowledge?

A. I had no personal knowledge of it.

Q. Did you have any contacts with the acoustical tile contractors at that time, prior to the termination meeting?

A. No, sir, I did not.

Q. You didn't talk to or telephone any of them?

A. No, sir.

Q. Did any of them come to the Flintkote office while you were there?

A. Not that I know of.

Q. Were you there nearly every day during that period?

A. Oh, yes.

Q. Did you hear of any threats of boycott of the Flintkote Company by other acoustical tile contractors—

A. No, sir.

Q. —if these plaintiffs were allowed to continue in operation?

A. No, sir.

Q. Did you hear of any meeting of the acoustical tile contractors about that time, dealing with the subject?

A. No, I did not. [1085]

Q. Who made the decision with respect to terminating your relations with the plaintiffs?

A. Well, Mr. Harkins and myself, with Mr. Baymiller and Mr. Ragland, discussed the situation very thoroughly, and I believe Mr. Harkins decided

(Testimony of E. F. Thompson.)

that the understanding must be terminated, and we agreed with that decision.

Q. Did you volunteer to do this job or were you asked to do it?

A. Well, it was my duty to do it. I wasn't—there was no special request.

Q. Did you select persons who would accompany you on this mission? A. Yes.

Q. How was that meeting arranged, if you know?

A. I believe Mr. Ragland made the appointment.

Q. And then did you proceed with the other two direct to the Bell office? A. Yes.

Q. Whom did you find there when you arrived?

A. One of the people that we wished to see. I don't know one from the other. One of them was there and the other came in shortly afterwards.

Q. After the second plaintiff arrived, how many were there.

A. There were five of us. [1086]

Q. And that is all? A. Yes, sir.

Q. What was said at that meeting, as nearly as you can recall?

A. Well, we didn't waste any time. I told the plaintiffs that we felt, we understood—we knew actually that the understanding which we had had with them, regarding their operation, had been violated.

That we could not go along with a program of that kind. That we felt we must terminate any arrangement we might have had with them at once.

(Testimony of E. F. Thompson.)

Q. What was said by either of the plaintiffs in response to that, Mr. Thompson?

A. They sought to clarify it, as to whether I meant——

Mr. Ackerson: I object to the opinion, your Honor.

Q. (By Mr. Black): Please state, as nearly as you can, the substance of what they said.

A. They asked me if that included the entire understanding, or whether just for the Los Angeles area.

In other words, if they returned to do business in San Bernardino would we continue to sell them, and in answer to that I said we would not. [1087]

Q. Was anything said at that meeting with respect to filling contracts which the plaintiffs may have had made for installations in this area?

A. Yes. That decision was made before we went to call on the gentleman. Mr. Harkins said that we might accept any orders for material covering contracts which they had executed and also for any material covering contracts which they may receive within a reasonable length of time, that we could fill those orders covering the contracts.

Q. Do you recall anything else that was said at that meeting?

A. Nothing of note, no. It has been several years. I don't think of anything of importance.

Q. Do you recall whether anything was said at that meeting in connection with pressure from other acoustical tile contractors?

(Testimony of E. F. Thompson.)

A. I was asked I believe if that was the reason for the termination, and I replied that it was not.

Q. Do you have any knowledge or did you at that time have any knowledge of any arrangement between the acoustical tile contractors for fixing prices or allocating bids? A. No, sir.

Q. Did you have any knowledge or notice of any meeting of the acoustical tile contractors in which a Flintkote representative was present with respect to discharging the [1088] plaintiffs from their relationship with Flintkote? A. No, sir.

Q. Did you ever hear of any threat by a Mr. Newport with respect to spending \$40,000 or \$50,000 to boycott Flintkote if they did not discharge the plaintiffs? A. No, sir.

Q. Did you have any later connection after this termination meeting with either of the plaintiffs personally? A. No, I did not.

Mr. Black: I believe that is all. You may cross-examine.

Mr. Ackerson: I have just a few questions.

Cross-Examination

By Mr. Ackerson:

Q. Mr. Thompson, did Mr. Ragland accompany you into Mr. Harkins' office when you introduced the plaintiffs to Mr. Harkins?

A. I think he did. Yes, I am sure he did.

Q. You are sure he did? A. Yes.

Q. Did he stay there all the time at the meeting?

A. That I don't know.

(Testimony of E. F. Thompson.)

Q. Did you stay there all the time?

A. I stayed there all the time.

Q. Well, then, I want to ask you a few [1089] additional questions as to what may have happened.

Do you recall Mr. Harkins wishing them well, sort of related how he had worked his way up to be chief in the Flintkote Company?

A. No, sir. Mr. Harkins didn't work his way up to be chief in the Flintkote Company.

Q. No, but he told how he had started low and worked high?

A. Maybe his life's history, perhaps.

Q. Yes. He did go into that, didn't he?

A. He could have said something of that kind. I don't recall.

Q. I want you to think seriously about this question, Mr. Thompson: Didn't Mr. Harkins refer to the Convair roofing job out near Pomona during that meeting? A. No.

Q. You say no? A. No, sir.

Q. Didn't Mr. Harkins tell these two gentlemen at that time, the two plaintiffs, that Flintkote had sold the roofing there for that job, that it was a big job, and that there was some acoustical tile in it, that they should go after it?

A. No, I don't believe he did.

Q. Did he say any of those things? [1090]

A. I don't believe that that came up for discussion.

Q. Your recollection is that the Convair job was never mentioned? A. That is right.

(Testimony of E. F. Thompson.)

Q. You know about the Convair job, don't you, Mr. Thompson? A. Yes, sir, very well.

Q. You sold about a million and a half feet of roofing on that job, didn't you?

A. I don't remember the quantity. It was a large quantity.

Q. It was large enough so that you had Jim Marlowe, your architectural adviser, out there advising on the installation, didn't you?

A. Probably not.

Q. Do you know what roofing company you sold that to, sold the roofing material?

A. We sold roofing there through one of our distributors to two roofing companies. One was the Associated Roof Company and the other was the Acme Maintenance Company, I believe.

Q. Yes. The Associated was one.

A. They had two companies operating on that job.

Q. So that you state Mr. Harkins made no mention of any of those subjects concerning the Convair roofing job? [1091]

A. I don't recall that he mentioned that, no.

Q. You don't recall, is that the answer?

A. That is right. That is my answer.

Q. But you have stated the facts purported to have been related are true, that Flintkote did sell the job? A. I am quite sure they did.

Mr. Ackerson: That is all.

Mr. Black: Thank you, Mr. Thompson.

(Witness excused.)

Mr. Black: Call Mr. Lewis.

SIDNEY M. LEWIS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Sidney M. Lewis.

Direct Examination

By Mr. Black:

Q. What is your position or occupation, Mr. Lewis?

A. I am assistant sales manager to the building materials division of the Pioneer Division of the Flintkote Company.

Q. What is your relationship with Mr. Harkins, or was when Mr. Harkins was with the company, and Mr. Thompson?

A. I was Mr. Harkins' assistant. [1092]

Q. And did you have that position in the summer of 1951? A. I did.

Q. Did you continue to occupy it until about the summer of '52? A. I did.

Q. In that capacity do you remain most of the time at the Flintkote office or do you go out traveling? A. I am in most of the time.

Q. What exactly are your duties in that capacity?

A. Well, in an administrative way I am involved in all of the policy functions which involve the operation of the sales department.

(Testimony of Sidney M. Lewis.)

Q. In that connection, is it part of your duties to be familiar with the volume of the acoustical tile sold in the Los Angeles area to your distributors?

A. I know because of the nature of my work I am familiar with the volume that we sell, yes.

(Exhibiting document to counsel.) [1093]

Mr. Black: I will ask this be marked for identification.

The Clerk: Defendants' Exhibit J for identification.

(The exhibit referred to was marked Defendants' Exhibit J for identification.)

Q. (By Mr. Black): Mr. Lewis, I show you a tabulation of certain figures which you have handed to me and which we have marked for identification, and I will ask you to state what that represents.

A. These figures represent sales of acoustical tile which we made and sold to the three accounts to whom we were selling acoustical tile during the years 1951, '52, and '53 and '54. They are taken from our records, which we tabulate at the end of each year, showing sales to all of our customers on all of our building materials.

Q. There are three columns marked "Acoustics, Coast, and Howard," and on another sheet is marked "Sound Control." A. That is right.

Q. Do you recall when Sound Control was operating as a Flintkote customer, as respects acoustics?

(Testimony of Sidney M. Lewis.)

A. As I recall, it was in April of '51. My memory—I am not positive on that.

It was early, I think, '51.

Q. That what happened?

A. That we felt that with volume of acoustical sales [1094] by Sound Control—that the volume was not as great as it might have been and that our company's interest could best be served by placing our business in the hands of another contractor.

Q. Well, looking at that Sound Control figure, Mr. Lewis, are you sure that '51 date is accurate?

A. No, I guess it isn't. It is '52.

Q. That is the other testimony in the case.

A. That is correct. These figures indicate it was early in '52.

Q. Now, will you kindly read into the record the figures for 1951 and 1952 for the respective accounts, just those two years, for the moment.

A. '51 and '52?

Q. Yes, sir. Please read them slowly, so we can understand them.

A. The year 1951, sales to Acoustics, Inc., were \$35,348.61.

For Coast Insulating Products, \$51,816.54.

R. E. Howard, \$53,015.98.

For the year 1952, Sound Control, \$3,590.72.

Acoustics, Inc., \$63,640.94.

Coast Insulating Products, \$58,733.99.

R. E. Howard, \$49,755.96.

Mr. Black: I will offer this in evidence, if the Court [1095] please, as our next exhibit in order.

(Testimony of Sidney M. Lewis.)

The Court: Received.

(The document referred to was received in evidence and marked as Defendants' Exhibit J.)

Q. (By Mr. Black): At that time, the period '51-'52, were those the only acoustical tile contractors selling your products in the Los Angeles area, apart from the plaintiffs' operations?

A. That is right.

Q. Did you have anything personally to do with the arrangements with the plaintiffs in this case?

A. No.

Q. Did you see them in the office before they were taken on as acoustical tile accounts?

A. I saw them enter Mr. Harkins' office at the time that the final arrangements were made.

The discussion which Mr. Thompson described as being held in Mr. Harkins' office.

Q. Were you introduced to them at that time?

A. No.

Q. Did you ever actually meet them personally?

A. No.

Q. What, if anything, was the first occasion for you to take any action with respect to these plaintiffs in connection with your duties at Flintkote company? [1096]

A. Well, I, handling most of the inside work when the order was placed, I probably had something to do with the handling of the order then, because I have charge of the clerical personnel in

(Testimony of Sidney M. Lewis.)

the office where orders are entered and sent to our mill at Hilo, Hawaii, for shipment to our customers.

I probably saw the order when it was first placed and had to do with the shipment.

Q. Do you remember seeing that document?

A. No.

Q. Do you have any recollection of any address on it?

Mr. Ackerson: He never saw it. I object to——

Mr. Black: He said he probably received the order. He actually doesn't recall.

The Witness: No, I don't recall the order, specifically the order, no.

Q. (By Mr. Black): What next did you have to do in connection with the plaintiffs in respect of your duties at the Flintkote Company?

A. Well, the next activity in which I was involved was a telephone call from Mr. Krause.

Q. About when did that occur?

A. As I recall, it was in the first or second week of February.

Q. Who is Mr. Krause? [1097]

A. Mr. Krause was, I guess, sales manager—he is associated with, was then and still is, I believe, associated with Coast Insulating Products as the sales manager.

Q. Did he call you or you call him?

A. He called me.

Q. What was said on that occasion?

A. As my recollection goes, Mr. Krause called

(Testimony of Sidney M. Lewis.)

me and said the plaintiffs had, were doing business in the city of Los Angeles, and requested that action be taken to correct the situation because, as he understood it, the customers we had had previously were all he felt we wanted in the city of Los Angeles. [1098]

Q. Was Mr. Krause rather emphatic on that occasion? A. Decidedly so.

Q. What did you say to Mr. Krause?

A. I told Mr. Krause that we would investigate the actions of the plaintiffs, that it was my understanding, as it was his, that the activities would be confined to the San Bernardino-Riverside area, that the action our company would take would be based upon our own investigation of the facts, that we wanted to act fairly and squarely as we would in the case of him, and that we would investigate and let him know what proper action the company would take.

Q. Was anything more said that you remember?

A. Well, he was insistant that action be taken immediately, and I said that inasmuch as the individuals who had made the direct arrangements were not available at the moment that when we had time to make a thorough investigation we would take the proper action.

Q. Who was absent at the time?

A. As I recall, Mr. Ragland was in the Northwest, whether it was in Seattle or Portland, he was in one of those towns, and Mr. Harkins was out of town. I thought he was in San Francisco,

(Testimony of Sidney M. Lewis.)

but that may not have been the case. He was not in the office.

Q. Did you have any other contact with the acoustical tile contractors about aabeta's [1099] activities?

A. No, except I believe in the course of the conversations with Mr. Krause there might have been two or three on that day or the two days, that he told me that the other of our customers were exercised and upset, and that inasmuch as it would take several days to investigate the facts, why I suggested to Mr. Baymiller, Mr. Ragland was out of town, Mr. Baymiller and Mr. Heller, that they explain to our other customers that we wanted to investigate the facts fully, that we wanted to take what action was right, and suggested that they make a call on the other of our two customers to whom I had not talked and explain that we had been advised that aabeta was doing business in Los Angeles and to investigate the facts fully and would advise them as soon as we found what the facts were.

Q. Did you attend any meeting of the acoustical tile contractors? A. No, sir.

Q. To the best of your knowledge was there such a meeting?

A. I know of no such thing.

Q. Did you ever hear of any threats against Flintkote to boycott the Flintkote Company if they did not discharge these plaintiffs?

A. At no time.

(Testimony of Sidney M. Lewis.)

Q. Did you ever hear of a remark by Mr. Newport that [1100] he would spend \$40,000 or \$50,000 to see to it that not another foot of tile was sold by Flintkote if they didn't discharge the plaintiffs?

A. I recall no such remark.

Q. Did any of these people at any time during this period come to the Flintkote office?

A. At no time.

Q. Did you call on any of them personally?

A. I did not.

Q. Do you know anything about a bid allocation scheme among the acoustical tile contractors about this time in the Los Angeles area?

A. None whatsoever.

Q. Or any plan for fixing prices?

A. None.

Mr. Black: That is all. You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. Now you have related everything, Mr. Lewis, that you recall that you had anything to do with in connection with the plaintiffs, you personally? You can think of nothing more?

A. Nothing more.

Q. Did you have a conversation with Mr. Hoppe over the phone or otherwise in connection with these people doing [1101] business?

A. Not that I recall.

(Testimony of Sidney M. Lewis.)

Q. Did you hear about such conversation with Mr. Harkins or Mr. Baymiller?

A. With Mr. Hoppe?

Q. Yes.

A. I recall no such conversation. It may have happened.

Q. You heard of no contact by Mr. Hoppe with Flintkote during this period?

A. I don't recall any, no. I don't say it didn't happen, because he may have talked to Mr. Harkins and I may not have known it.

Q. Was it ever brought to your attention that Mr. Hoppe did object strenuously other than through Mr. Krause?

A. No, only through Mr. Krause.

Q. But Mr. Hoppe did cease handling Flintkote, you state, the first part of 1952?

A. That is correct.

Q. You stated that when Mr. Krause called you in his emphatic way he objected very strenuously and he wanted immediate action, is that right?

A. That is correct.

Q. And I thought I understood you to say, because it was his understanding that there weren't to be but three [1102] Flintkote dealers in the area. Was that about the gist of it?

A. That is right.

Q. You don't know of any prior discussions with Mr. Krause, do you, as to whether or not you should give these plaintiffs a franchise—I don't mean a franchise in the strict sense, but to supply

(Testimony of Sidney M. Lewis.)

Flintkote tile to them—and discussed it with Mr. Krause first?

A. It would hardly seem possible that we would.
Mr. Ackerson: That is all, Mr. Lewis.

(Witness excused.)

Mr. Black: If your Honor please, I am fresh out of witnesses for the day. I assumed that the cross-examination would be a little more extensive and I mis-estimated it by 10 minutes.

The Court: How long do you anticipate the further presentation of your case?

Mr. Black: I think we should, depending of course on the length of cross-examination—we think we are nearly through. We have quite a few additional witnesses but most of them are very short, just little bits of pieces, so to speak. I would imagine one full afternoon's session.

Mr. Ackerson: Since Mr. Black doesn't confide in me about his witnesses or subject matter, but anticipating in my own mind what they will be, I think my cross-examination [1103] will be very brief, your Honor.

And I will have perhaps a half hour or an hour of rebuttal.

The Court: Then we ought to finish the case early next week.

Mr. Black: I would think so.

Mr. Ackerson: Yes.

The Court: I am interested to know what the prospects are because we have a case set for trial here next Tuesday.

Mr. Black: All I can say is that the direct examination will be relatively short with my additional witnesses.

Mr. Ackerson: I think we could anticipate finishing very early next week. I am a little bit in the dark here, but if I can correctly surmise what Mr. Black is going to do, I can still state that my cross-examination will be very short.

The Court: Very well. The further trial of this case is recessed until tomorrow at 1:30, and the court is recessed until tomorrow morning at 9:30.

(Whereupon, at 4:15 o'clock p.m., an adjournment was taken until 1:30 o'clock p.m., Friday, May 20, 1955.) [1104]

May 20, 1955; 1:30 o'Clock P.M.

The Court: Proceed with the trial.

Mr. Black: Call Mr. Harkins, if the court please.

FRANK S. HARKINS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Frank S. Harkins.

Direct Examination

By Mr. Black:

Q. What is your present occupation, Mr. Harkins?

A. I am in business for myself under the name

(Testimony of Frank S. Harkins.)

of the Harkins Distributing Company.

Q. How long have you been in business for yourself? A. Since May 9th of last year.

Q. From what place did you go to your present occupation?

A. From The Flintkote Company.

Q. And what was your position there?

A. I was manager of the building materials division.

Q. How long did you hold that position?

A. The tile probably 15, 16 years; I was down there about 19. [1106]

Q. And was your relation with that company continuous for that period? A. Yes.

Q. And I take it that you were occupying that position in the summer of 1951 through the spring of 1952? A. Yes.

Q. Will you briefly describe your duties in that position, Mr. Harkins?

A. Well, actually the company was divided into two parts, the paper section and the so-called building materials section, and for part of that time I had charge of all activities in the building materials division, subsequently the sales end of it primarily.

Q. Was acoustical tile included in the materials with which you dealt? A. Oh, yes.

Q. Will you tell me as briefly as possible the experience of your company in connection with the development of that commodity in this area?

A. Well, in May, I believe, of 1948 we bought the Hawaiian cane products plant of Honolulu

(Testimony of Frank S. Harkins.)

and Hilo and as a product of that mill acoustical tile was manufactured. It became one of the various items that were acquired in the acquisition of their insulating board plant.

The acoustical tile business is rather separate from the [1107] so-called dealer items like sheathing and board for tile and planking of walls. If I understand your question, you would like to know when we started in the acoustical tile business?

Q. Yes. Review it briefly, if you will.

A. Well, they had a machine and were manufacturing acoustical tile when we acquired it. We therefore acquired the problem of distributing it.

At that time, getting back to the background of the industry a little bit, because the acoustical or drill board industry differs a little from the others, it is a separate industry; it had been the practice, we will say, or the custom of the industry to sell that through special contractors who promoted it, sold it, and so forth, and we had the decision to make as to whether to make a general line product out of it or a specialty line product.

We elected to sell the board, the drill board, acoustical board, to recognized acoustical contractors and not throw it into the dealer or general line position, which is what we did. And we sold many people in the acoustical contracting field the board.

Now beyond that point—do you want me just to continue with the history?

(Testimony of Frank S. Harkins.)

Q. Yes, with particular reference to the Los Angeles area.

A. Well, that would apply to Los Angeles and other [1108] places, too. In the Los Angeles area we sold a great many acoustical contractors the acoustical board, the product of the mill. We were in this position actually, we had a very, very short line as related to some of the older people in the business, because actually the Hilo machine to drill the board had only been in a few months before we acquired the plant. So we had a very short line and were not in position actually to compete on a full line basis with the founder of the business, which of course was Celotex.

So we took our business from a group of acoustical contractors, which I could recite probably.

As we improved it and as we improved the line and extended the products and as our relationship with the people that we were selling became a little more clear, it seemed advisable because of the development of our situation or improvement to get on some kind of a firm distribution policy, which we did, by electing, all of us, to limit our distribution to three of the contractors who at that time seemed to us to have the greatest potential for us on this split line basis.

Q. What do you mean by "split line basis"?

A. Well, that is an account that handles more than one make or product. In other words, our setup with Dick Howard, for example, that seemed to be very advantageous from our standpoint be-

(Testimony of Frank S. Harkins.)

cause one of the elements in the market, which was a problem, was the manufacturing of incombustible tile, [1109] we didn't have. Through Dick Howard's association with his supplier they had incombustible tile so the two blended together very well.

Our drill board with the holes in it and his incombustible tile completed a line or more or less built up a line.

And the setup with Coast, with Mr. Newport's organization, was somewhat of the same type. I mean, he had Simpson products and we had a great many things that Simpson didn't have and they, in turn, had some things we didn't have.

So there was a natural filling out or a natural correlation from a sales or line standpoint with these folks that we finally elected to do the business with, or that we restricted our [1110] distribution to.

Q. At the time I am speaking of, the fall of 1951, who were the Flintkote customers in this area?

A. I believe at that time we were selling only Coast Insulation, Dick Howard, and I believe Sound Control at that time.

Q. And did you have any contracts with these people that there would be only those distributors in this area?

A. No, no strictly sales policy, enunciated sales policy, no contract.

Q. Was that policy determined exclusively by The Flintkote Company? A. Oh, yes.

(Testimony of Frank S. Harkins.)

Mr. Ackerson: Well now, your Honor, I move the answer be stricken for the purpose of an objection.

The Court: Granted.

Mr. Ackerson: I object on the ground that this is a conclusion and hearsay.

Mr. Black: I submit the witness had the——

Q. (By Mr. Black): You had the determination of that policy in your own hands, did you not?

A. I did.

Q. You didn't have to get any orders from anybody else? A. No, sir.

Q. And who fixed the policy? [1111]

A. I did.

Mr. Black: I think that answers my question.

Mr. Ackerson: I object to it on the ground of hearsay.

The Court: Overruled. You don't have to prove a conspiracy of this kind, the kind you allege here, by introducing a resolution of the board of directors. You don't have to prove every corporate act in defense, by such a means, either.

Mr. Ackerson: I think you are right.

Q. (By Mr. Black): Mr. Harkins, what was the first knowledge or notice you had of the possibility of business relations with Messrs. Lysfjord and Waldron in the acoustical tile business?

A. What or when? I couldn't say when. I would say that several times in, oh, perhaps a year preceding the period you are talking about I had had word from, oh, either Mr. Baymiller or Mr. Rag-

(Testimony of Frank S. Harkins.)

land or somebody—well, I think originally it came through Baymiller that these friends of Mr. Ragland were very anxious to go into business and wanted to enter into the acoustical contracting business in Los Angeles.

That was not an uncommon request at that time, because there were a great many people who were seeking sources of supply for acoustical board. The product was in short supply.

Mr. Ackerson: Your Honor please, I object to this as not [1112] being responsive to the question; opinion.

The Court: I think the objection is probably good. Listen to the exact question and try to limit the answer to the exact question.

Mr. Black: I think that the question—will you read the question?

(Question read.)

The Witness: Possibly a year before the fall of '51.

Q. (By Mr. Black): What information came to you and from what source?

A. Mr. Baymiller, I believe, told me that two friends of Mr. Ragland were very anxious to go into the acoustical tile business.

Q. What was the situation with respect to additional accounts in the Los Angeles area at that time? A. I said no.

Mr. Ackerson: I move that be stricken as not responsive, either, your Honor.

(Testimony of Frank S. Harkins.)

The Court: What about it, Mr. Black?

Mr. Black: Well, it was a short answer to my question. It is exactly the situation that I wish to develop on this score.

Q. (By Mr. Black): I will put it this way: Were you looking for additional outlets in the Los Angeles area at that time? [1113]

A. No.

Q. Then will you proceed with the developments that ultimately led you to have further contact with the plaintiffs in this case, looking toward the establishment of a business relation with them?

A. I will do so, as briefly as possible. This interest of the gentlemen, the friends of Mr. Ragland, came to me not once but two or three times. I said no on each subsequent approach.

I was then told that they were going to contact these gentlemen and have lunch with them, to discuss the matter further. They had asked for some kind of a session to really go over the possibility of becoming a contractor.

I was subsequently told that they wanted to go in business in San Bernardino.

Mr. Ackerson: May we have the time and place and the parties present, Mr. Black?

Mr. Black: Can you fix that time fairly accurately, when you were told?

The Witness: Which time and what place?

Q. (By Mr. Black): When you were told they were being considered for San Bernardino.

(Testimony of Frank S. Harkins.)

Mr. Ackerson: Who told him that?

The Witness: Mr. Thompson.

Q. (By Mr. Black): About what time was that, can you [1114] place it?

A. I would say it was late in the year; probably in November.

Q. 1951? A. Yes.

Q. What, if anything, did you do in response to that suggestion?

A. Well, I asked Mr. Thompson if they were interested, actually seriously interested in establishing these people as contractors in San Bernadino.

He said yes, he thought they might be all right. He said, "Do you want to meet them?"

I said, "I would like very much to. Before we are going to take on anybody in the area, even though San Bernardino, I would like to meet these people, I would like to see what they look like."

Q. Was anything done to arrange a meeting?

A. A meeting was arranged.

Q. Did you attend such a meeting yourself?

A. It was in my office.

Q. Who else was present?

A. I think Mr. Lewis was in and out of the meeting a couple of time.

Mr. Thompson was there during the entire meeting. The two gentlemen were there. I think that is all. [1115]

Q. Now, Mr. Harkins, I am going to ask you to relate as nearly as you can the discussion that ensued at that meeting.

(Testimony of Frank S. Harkins.)

I wish to make this admonition to you, if I may: In giving us your version of what went on at that meeting, please try to give us as nearly as you can recollect the substance of what actually was said and who said it, rather than your summarization of the effect or the conclusion that you would draw from what was said.

Do I make myself clear? A. Yes.

Q. Then would you just—just one more question. Was Mr. Ragland present?

A. No—I don't think so. He may have been. If he was—as a matter of fact, there was practically no discussion, conversation with anybody there except me with the two gentlemen. If he was there, he was sitting in a corner quietly. I am not aware he was there.

Q. Then you will kindly relate, as nearly as you can now recollect, what was said by you and by the plaintiffs at that meeting?

A. The first—I mean there were introductions, et cetera, et cetera.

They then handed me a financial statment, et cetera. I looked that over. I recall that in the book of particulars [1116] that they had a little operating forecast made up for this business.

As I recall it, I commented about that and complimented them on going far enough in their thinking to prepare a little opening statement. And disposed of the credit statement on the theory it would go to the credit department, anyhow, and we set that aside.

(Testimony of Frank S. Harkins.)

The conversation from then, both the gentlemen explained their backgrounds, I mean in the industry and their knowledge of the sale and application of the product.

I couldn't tell which was which because I couldn't recognize hardly today, as a matter of fact. But they outlined their background and experience rather completely.

I subsequently said, about the only thing I remember of note, that I had been particularly interested in the meeting because I thought there were generally three things that caused failure in business. I don't like to see people leave good jobs and go into business simply for the purpose of going into the business and then not making a success of it.

I said, "No. 1 is generally a lack of capital."

I said, "Your statement indicates that for a small business you will probably get along all right. We will show that to Mr. McAdow."

And I said, "No. 2 is lack of experience." I said, "You both indicate that you have very good working knowledge [1117] of both sales and application."

And I said, "No. 3 is general sales opportunity. You can't sell where there aren't people to buy. If you are satisfied there is enough sales opportunity in the area, that would answer the third requirement."

And one of them assured me they made a very

(Testimony of Frank S. Harkins.)

careful study of the area and there was just lots of business down there to support their operation.

So I said, "That answers my three requisites," and I said, "That is about all there is to it." [1118]

Mr. Black: May I have that financial statement? I am not sure that I know the exhibit number.

(The exhibit referred to was passed to counsel.)

Q. (By Mr. Black): I show you, Mr. Harkins. Plaintiffs' Exhibit 44, which is a folder marked aabeta company, Los Angeles, showing a financial condition as of December 1, 1951, and I will ask you if you recognize that as the document you saw when you refer to the financial statement.

A. (Examining exhibit): This is it.

Q. I call your attention the place "Los Angeles" under the name "aabeta company." Since it has been offered in evidence a red ring has been drawn around that name, which we understand was not there at the time. Do you recall whether you saw that word or not at the time you examined it?

A. I don't imagine I was very conscious of the cover, that I never saw either the aabeta or the address.

Q. Do you recall anything else that was said at that meeting other than what you have related?

A. Not specifically. I remember when we were there, Mr. Thompson said, "Is that all?"

I said, "Yes, that is all as far as I am concerned."

(Testimony of Frank S. Harkins.)

There was some general conversation. I presume the gentlemen were in the office 15 or 20 minutes, and it had taken me three to brief it. [1119]

Q. But that is all you now recall that has any bearing on your business relations with these people? A. Yes.

Q. When was the next occasion you had to deal in any way with the activities of the aabeta company?

A. Well, assuming the placement and shipment of orders, I had nothing directly to do with them. The next time I had anything to do with the operations was when I returned from San Francisco in, I would say, February sometime of '52. I got back from San Francisco I believe on a Wednesday morning and I stayed at the office and Mr. Lewis came into the office and said that there had been some difficulty.

I said, "What is the trouble?"

He said, "Well, this aabeta crowd are not doing as they agreed to do. They are, according to reports we have, soliciting business in Los Angeles, making bids to all the Los Angeles general contractors and were very active downtown."

Also he stated, "It is further reported that they have a warehouse and place of business here someplace in town."

I said, "Oh, is that so?"

So he said, "There has been quite a lot of commotion about it."

I said, "Where is Ragland?"

(Testimony of Frank S. Harkins.)

He said, "He is in the Northwest." [1120]

I said, "When will he be back?"

He said, "He will be back Friday morning."

"Well," I said, "as soon as he gets back we will put him on it and let him get out and see what he can find out to verify the report."

And which we did.

Mr. Lewis also told me that he had had a telephone call from Mr. Krause of Coast Insulating, and that Mr. Krause had wanted to get a meeting of some kind together to discuss the situation, which was not in accordance with our understanding, and Mr. Lewis had said that he or nobody from the company would attempt such a meeting. He said, "Did I do right?"

I said, "Eminently."

I said, "There will be no meetings of that sort with the distributors at this point."

So I got ahold of Mr. Newport, who I have known for many years, and I told Charlie that we would have lunch on Friday together, which we did.

Do you wish me to continue from there?

Q. Yes. What did Mr. Newport say on that occasion?

Q. Well, I went out to his place of business and picked Mr. Newport up and we went over to the Brown Derby.

Before we left for the Brown Derby I told Mr. Newport that I had heard about this story that Krause had called in, and so forth. I said, "I want to make it perfectly clear to [1121] you that I am

(Testimony of Frank S. Harkins.)

not going to discuss the matter of the aabeta company with you now. I don't want you to discuss it with me. When a decision is made it will be based on the facts as we find them and it will be for our benefit, it will be for the good of The Flintkote Company."

I said, "I will not discuss the matter with you at all."

Q. Did Mr. Newport ever make any threat of boycotting The Flintkote Company—

A. No.

Q. —if—

Mr. Ackerson: Your Honor please. Mr. Black, will you ask what Mr. Newport said? After all, I must object otherwise. I don't know what Mr. Harkins considers a threat. Will you ask him the direct question and avoid objections?

Q. (By Mr. Black): Did Mr. Newport say in your presence at any time that he would spend \$40,000 or \$50,000 to see to it that not another piece of Flintkote tile was ever sold in the Los Angeles area if the aabeta company were not thrown out of business? A. Never.

Q. Did you ever hear of such a statement from Mr. Newport? A. No.

Q. How well did you know him? [1122]

A. Oh, I didn't see Charlie very often, but the family lived near us and his daughter, before she was killed, and my son were playing around with the same crowd and I have known him off and on for 17, 18, years.

(Testimony of Frank S. Harkins.)

Q. Do you know where he is now?

A. I understand he is in Europe.

Q. Did you ever hear of any meeting of the general acoustical contractors dealing with Flintkote products relating to this aabeta situation?

Mr. Ackerson: May I have that question again?

The Witness: I don't know—

Mr. Ackerson: Just a moment. I didn't hear the question, Mr. Harkins. I am sorry.

(The question referred to was read by the reporter as follows: "Q. Did you ever hear of any meeting of the general acoustical contractors dealing with Flintkote products relating to this aabeta situation?")

The Witness: The only meeting I ever heard of was the one that Sid told me that they were trying to get together to talk to them on, which was never held as far as I know.

Q. (By Mr. Black): As far as you know, it was never held? A. No.

Q. You never attended any such meeting [1123] yourself? A. No.

Q. And you never heard from any of The Flintkote people that they had attended any such meeting? A. No.

Q. Did Mr. Newport say he would boycott The Flintkote Company if they did not discharge the aabeta company? A. He never did to me.

Q. Have you ever heard of any such statement from him? A. No.

(Testimony of Frank S. Harkins.)

Q. Have you ever heard of any such statement in similar language being made by any of The Flintkote customers in this connection?

A. No.

Q. Did any of these people come to the Flintkote office at the time you were concerned with this problem? A. Not when I was there.

Q. After you returned from San Francisco, were you there for several days continuously?

A. Yes, I was there, I presume—I know—for the next 10 days or two weeks because that is during the period of the investigation.

Q. And during that time did any of the acoustical tile contractors dealing in Flintkote products come to your office?

A. They did not come to me, as far as I know.

Q. As far as you personally knew? [1124]

A. No.

Q. Then what subsequently developed in connection with this investigation?

A. Ragland came back and we sent him out to see if he could verify some of these reports, and also to see if he could find the alleged downtown warehouse and Los Angeles operation.

He first came back and said he couldn't find it. As a matter of fact, he found a carpet place at the location he was looking for. But later on he did. I believe it was by picking up a business card——

Mr. Ackerson: Just a moment, your Honor. I object to this is opinion and hearsay, no foundation laid.

(Testimony of Frank S. Harkins.)

The Court: Sustained.

Q. (By Mr. Black): What next happened to your personal knowledge?

A. He eventually found the Los Angeles address or the uptown address of the aabeta company as a warehouse, and he also found that they were bidding a substantial number of jobs in this area. He made that report to me verbally and also in writing.

Q. I show you, Mr. Harkins, a document which has been offered in evidence as Defendants' Exhibit I, which purports to be an inter-office letter from Mr. Ragland to yourself, and ask you if that is the document you are referring to. [1125]

A. (Examining exhibit): Yes.

Q. Did you have any practice or custom in your office with respect to noting on a document whether you had seen it or not?

A. That is my initial (indicating).

Q. Referring to the initial "H" at the lower left-hand corner of the document?

A. Yes. And that is my standard way of noting it for file.

Q. By drawing a line diagonally down the page, as it is here? A. Yes, sir.

Q. And you did that at the time?

A. Yes, sir.

Q. To the best of your knowledge was that looked at by you about the date that it bears?

A. Yes, sir.

(Testimony of Frank S. Harkins.)

Q. What next developed in this connection after the receipt of that report?

A. Well, the next thing developed of course was a discussion between Baymiller and Thompson and Sid Lewis and myself regarding the facts as they had been developed.

I very carefully went back over the ground with Mr. Thompson and Mr. Baymiller regarding the previous meetings of these people to be positive that there had been no misunderstanding [1126] in my mind or in theirs as to the terms and conditions under which we were approving them as acoustical contractors in San Bernardino.

I satisfied myself in the review of those facts and the various discussions and the so-called luncheon——

Mr. Ackerson: Your Honor please, this is not responsive either. I think Mr. Harkins ought to state what was done. As I recall the question, that was the question. I will object to it as not [1127] responsive.

Mr. Black: If the court please, this is exactly one of the matters at issue in this case, namely, the motives and purposes of the defendant in discharging these people.

Mr. Ackerson: I am merely asking that the proper question be asked and the proper answer be given.

The Court: The objection went to the question, but you waited until after it was answered to place an objection. If what you are getting at is the form

(Testimony of Frank S. Harkins.)

of the answer, you don't reach the form of an answer by an objection to the question.

Mr. Ackerson: Very well. I think I heard your Honor's warning to Mr. Black at the beginning of this case, and I am afraid I did the same thing. I will withdraw it.

The Court: All right.

Q. (By Mr. Black): Will you proceed, Mr. Harkins, and if you need the thread picked up by the reporter, we can do that.

Do you recall where you stopped?

A. Yes, I believe I was——

Q. You may proceed.

A. I believe I was discussing the further investigation I made of the background to the arrangements before they finally came to my office to get an approval.

I satisfied myself, both in Mr. Baymiller's mind and Mr. Thompson's mind, there was no question as to our status of doing business with these people at San Bernardino. [1128]

Very shortly thereafter, perhaps at the same meeting, I said, "I think we have no option here. We have a violation of a very definite agreement."

And I said, "We will cease from selling them."

I said, "You and Mr. Thompson will take that responsibility and tell the people we will no longer consider them as approved acoustical contractors. If they have any jobs on which our material is required, if they have any outstanding bids on our material, they will be given a reasonable length of

(Testimony of Frank S. Harkins.)

time, three or four weeks, to convert the outstanding business into firm contracts and we will still supply the material.”

Q. What happened then?

A. Mr. Thompson went, I presume went to their place. I didn't go with him. Mr. Baymiller did go.

And he advised the gentlemen we were terminating our sales agreement with them, we were no longer going to consider them as approved contractors.

And he also told them the same thing, that they would be given any reasonable period of time to get the materials for contracts they then had in force or for any outstanding bids where materials would be required. As a matter of fact, we supplied material to them subsequent to the cancellation.

Q. What personally did you have to do with this matter after that, Mr. Harkins? [1129]

A. Nothing.

Q. That was your last connection with the episode?

A. Yes.

Q. That is, personally?

A. Yes.

Q. During any of this period, between the summer of 1951, through the period of this termination of relations, did you have any knowledge or notice of any program of job allocating between the acoustical contractors in the Los Angeles area?

A. No.

Q. Did you have any notice or knowledge that there was any scheme for price fixing going on between the contractors?

A. No.

(Testimony of Frank S. Harkins.)

Q. One more question. At your meeting with these plaintiffs, was anything said as respects the fact that the plaintiffs were selling nothing but Flintkote tile or would be selling nothing but Flintkote tile? Was that subject mentioned?

A. No, sir, not to my knowledge.

Mr. Black: You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. As I recall your testimony, Mr. Harkins, you said [1130] you were particularly interested and examined that part of this financial statement that had to do with sort of a projection of future business ideas, you know, activities and quantities in the future.

You were interested in that and that was one of the three points you called to their attention.

A. No, that isn't exactly what I said.

Q. What was that?

A. What I said was I would look over—you can read it back if you want to.

Q. I just want to know what you said.

A. What I said was, I commented on the fact they had prepared a little operating budget.

I said it was quite unusual for people to get that far, they usually prepare financial statements, but not an operating statement.

Q. You complimented them on that.

(Testimony of Frank S. Harkins.)

A. Yes.

Q. And you thought that was very good?

A. Yes.

Q. You noted that particularly, didn't you?

A. That is one of the ways I identified the document.

Q. Yes. I want to ask you to identify the document again by that particular part of it, Mr. Harkins. This is the part of the document you refer to, isn't it (indicating)? [1131]

A. Yes. They had a total value for us in March—I mean that was their cash requirements for cash operating, et cetera.

Q. That is what you complimented them on particularly, wasn't it?

A. Yes. I said that it was rather unusual for people to go beyond strictly a financial statement and try to prepare a little cash operating statement.

Q. It showed unusual foresight and you noted that? A. I noted it.

Mr. Ackerson: I would like the jury to note that on this particular page of Exhibit 44 in evidence the address of the aabeta co. on this page.

Mr. Black: There is no question. That is just a matter of argument.

The Court: Any counsel may pass any exhibit to the jury whenever they please.

Mr. Black: The witness is entitled to have that matter drawn to his attention. It is unrelated to any question.

(Testimony of Frank S. Harkins.)

The Court: At the beginning of the trial I said that unless I departed from my usual custom, that any counsel may have any exhibit passed to the jury at any time he deems it appropriate.

We will not depart from that, which has been my custom in almost five years now, and I picked that up from Judge [1132] McCormick who sat here for almost 30 years ahead of me.

Mr. Ackerson: I think that was one of the first things your Honor announced at this trial.

Mr. Black: We have no objection to the jury examining it, but the comment of counsel was unrelated to any question.

Mr. Ackerson: I had to direct the portion of the document I wanted to call to the jury's attention.

The Court: Since it was a long document and he only wanted to call their attention to a small part of it, I think his comment is proper. You can do the same, Mr. Black.

Q. (By Mr. Ackerson): Mr. Harkins, this is a defendants' Exhibit J in evidence. It was introduced by Mr. Lewis yesterday as the total yearly volume of sales of Flintkote acoustical tile to four Flintkote dealers.

I mean it includes Sound Control up to the first part of 1952. Then it substitutes Acoustics, Inc., for Sound Control. A. Yes.

Q. You will note, will you, Mr. Harkins, that in the year 1941 Coast Insulating—

A. '51 you mean?

Q. Yes, '51. Coast Insulating Products—

(Testimony of Frank S. Harkins.)

A. Yes.

Q. —That they purchased \$51,816.54 worth of tile from Flintkote. A. Yes. [1133]

Q. And that Howard Company purchased \$53,015.98 worth of tile. A. Yes.

Q. You will note on the second page that during the same year, 1951, Sound Control purchased \$35,348.61 worth of tile, is that correct?

A. I wouldn't know.

Q. I mean, that is what you see on the exhibit, is it not? A. I see it, yes.

Q. This is preliminary. The previous year, in 1950, Sound Control purchased only \$17,449.20 worth. A. Yes.

Q. I am reading those figures correctly?

A. Yes.

Q. You note that in 1952 Coast purchased fifty-eight thousand plus dollars worth. Howard purchased forty-nine. But in '53 you note that Coast purchased \$89,000.00 and Howard purchased \$125,000.00 worth of Flintkote tile, is that right?

A. Yes.

Q. Now, I would like to ask a couple of questions on the basis of those figures, Mr. Harkins.

I believe you have testified that Mr. Lewis told you about Gustaf Krause calling up. [1134]

A. That is correct.

Q. And I believe you said that you caused an investigation to be made thereafter and so on. I wanted to ask you whether or not you ever talked directly with Gustaf Krause, No. 1, about the

(Testimony of Frank S. Harkins.)

plaintiffs' business. A. No.

Q. You stated you talked with Mr. Newport of Coast Insulating? A. Yes.

Q. And that he was an old friend of yours? You had known him seven or eight years, and he was a neighbor? A. Yes.

Q. Did you ever talk with Mr. Howard of Howard Company about plaintiffs' business?

A. I have never met Mr. Howard.

Q. Never met him. Was any conversation of Mr. Howard with either Mr. Lewis, Mr. Thompson, Mr. Baymiller, or Mr. Ragland called to your attention, that is, any conversation concerning plaintiffs' business? A. No.

Q. Was it ever called to your attention that your existing Flintkote outlet, namely, Coast and Howard, might agree to purchase more Flintkote tile if you did cut these people off?

A. Will you state that again? [1135]

Q. Was it ever indicated to you through either Baymiller, Ragland or Thompson or Lewis that either Howard or Coast Insulating might purchase more Flintkote tile if you terminated these plaintiffs? A. Never.

Q. Never. At the time, 1951, was when you were negotiating with plaintiffs, wasn't it, started in June, I believe, Mr. Harkins? A. Yes.

Q. I know you say it, but I think your prior testimony shows the serious conversations started about June when Mr. Ragland became definitely associated with acoustical tile line of Flintkote.

(Testimony of Frank S. Harkins.)

A. Yes.

Q. Which, I think, was June 1st. At that time, the previous year, I should say, we have noted that Sound Control only purchased \$17,449.20 worth of acoustical tile from Flintkote.

A. Yes. [1136]

Q. Is it possible, Mr. Harkins, that you needed another outlet in the Los Angeles territory at that time who could supply Flintkote tile? Had you considered that fact?

A. No. We didn't need any additional distribution. We were actually taking off distribution.

Q. Was Sound Control satisfactory to you in 1951?

A. We changed from Sound Control to Acoustics, Inc., ultimately.

Q. I know, but in 1951.

A. No, they were a disappointment to us.

Q. Did you ever talk to them about supplanting them with another distributor?

A. Not in '51.

Q. But in early '52 you did, as I understand it, is that right?

A. Some time in '52 we changed from Sound Control to Acoustics, Inc.

Q. Did you talk with Mr. Hoppe about that personally? A. No.

Q. Was it ever called to your attention that Mr. Hoppe at the time these plaintiffs came into business in Los Angeles threatened to quit handling

(Testimony of Frank S. Harkins.)

your tile? A. Not to my knowledge.

Q. Assuming, Mr. Harkins, that these plaintiffs through their financial statement, their other statements to [1137] you about experience, past sales experience, quantities, and so forth, could have sold a minimum of a carload of Flintkotè tile a month, is it still your statement that you would still prefer to have Sound Control in there? You would still not permit them to operate in the Los Angeles area?

A. I think that is a hypothetical question in the first place.

Q. That is true, but I mean you have answered as an expert in the past and I think you should be able to answer this question.

A. Our negotiations with these people were not as to whether they would supply a \$60,000 volume in the city of Los Angeles or not.

Q. No.

A. The discussion with them was whether they wanted to go into business in San Bernardino or not.

Q. Well, that is your statement. I realize that, Mr. Harkins. But that is the issue in question here, too.

My question was, and it is only partially an assumption, in 1950, the year immediately preceding this, Sound Control, one of your three distributors, purchased only \$17,449 worth of tile from you. And I say now to you, as an expert in Flintkote, the chief of the 11 western states out here, if the

(Testimony of Frank S. Harkins.)

facts presented to you by these plaintiffs showed that they could handle a minimum of one or two carloads a month, [1138] would you have been willing to permit them to supplant Sound Control in this area?

A. Under certain circumstances, surely.

Q. What circumstances?

A. But that never was approached and that never was demonstrated, that that is what they intended to do or could do.

Q. They told you what they had been selling for Downer Company, didn't they?

A. That is a little different. Somebody coming from Harold Shugart might tell me that Mr. Shugart is doing a great deal of business. That I agree to.

Q. The question was based on an assumption and you said under certain conditions.

A. Yes.

Q. Well, now, Coast in 1951—that is a big outfit, isn't it? . . . A. Yes.

Q. They apply a lot of tile every year, don't they?

A. Yes, they had very good volume.

Q. A carload of acoustical tile is usually figured on a basis of 60,000 units, is it not?

A. 56,000.

Q. 56,000? . . . A. 56,000 square feet. [1139]

Q. And it is based on half-inch tile?

A. Half-inch tile.

Q. Then if you have a quarter-inch tile, it adds

(Testimony of Frank S. Harkins.)

to the units and you may get less units or you may get the same units of tile.

A. It is based on the size.

Q. I think your answer is that it is 56,000 units, but I mean for mathematics here, and to make it easier, if it does make it easier for you, how many carloads of Flintkote tile did this large Coast outfit order during the year 1951 based on your figures from your books here?

A. It is roughly 10 carloads.

Q. Less than a carload a month?

A. Yes.

Q. And of course the answer would be the same for Howard, wouldn't it? A. Yes.

Q. Roughly 10 carloads? A. Yes.

Q. Well, it is a little less than 10 carloads in each instance, isn't it?

A. Yes. They run around \$5,000.

Q. I think the first carload these plaintiffs ordered was \$6,038 and something.

A. That is more than a minimum car. You based your [1140] question on the fact that a minimum car is 56,000 square feet of half-inch, which would run about \$5,000, which is what I said.

Q. All right. It makes no difference.

Now in 1950 Sound Control purchased \$17,449. That would be about three cars plus.

A. Three cars, yes.

Q. And in '51 they purchased \$35,348 worth of acoustical tile, which would be approximately six cars, is that right? A. Yes.

(Testimony of Frank S. Harkins.)

Q. And I note that beginning in 1953—let me strike that, Mr. Reporter; I have a preliminary question.

In your experience with Flintkote—you probably can answer this question, Mr. Harkins—you know, do you not, that in the acoustical tile contracting business there is a lapse usually of a number of months between bidding a job and installing a job? A. Yes, in some cases.

Q. And in large jobs, at least the substantial work, it ranges from maybe two or three to maybe as high as 10 months, doesn't it?

A. It depends on the job.

Q. And these large jobs account for the great bulk of the sale of acoustical tile, do they [1141] not? A. Yes, I think so.

Q. Now I point out the fact that beginning in 1953 the Coast Company jumped their purchases of tile—jumped to \$58,000 from 1951 to '52; they jumped from \$58,000 in '52 to \$89,000 in '53; and they jumped from \$89,000 in '53 to \$102,000 in '54—and I ask the question if that increase in tile purchases had anything to do with the conferences of Coast and Howard concerning the operation of the plaintiffs in Los Angeles.

A. Nothing whatsoever. [1142]

Q. They never promised—

A. Nothing whatsoever.

Q. —to increase their purchases of Flintkote tile? A. Never.

(Testimony of Frank S. Harkins.)

Q. And you state that Mr. Hoppe never did say he would quit handling your tile if you didn't?

A. Not to me or that I ever heard of.

Q. Now I would like to start at the end of your testimony, Mr. Harkins, and I am referring to the conference in your office when these plaintiffs were accepted as acoustical tile dealers, and I believe you stated to your recollection Mr. Ragland was not there?

A. I said if he was I wasn't conscious of it.

Q. And Mr. Baymiller was not there?

A. No.

Q. So that I take it, according to your recollection, Mr. Thompson brought them in and introduced the plaintiffs to you? A. Yes.

Q. And that was the first you had met either of them? A. That is right.

Q. Did Mr. Thompson remain there during the entire session?

A. Yes, during the entire meeting.

Q. You are positive of that? [1143]

A. I am positive of that.

Q. At that meeting, aside from looking over this financial statement, you had a friendly chat, as you would with any other new client or customer?

A. I trust so.

Q. You told them, did you not, about your own experiences in coming up in the Flintkote field by way of encouragement?

A. Not that I recall, no.

(Testimony of Frank S. Harkins.)

Q. Well, you talked about your past experience?

A. You say I did. I said I don't recall that I did.

Q. All right. Did you mention the Convair job out at Pomona? A. I don't know.

Q. Don't you recall, Mr. Harkins, that you mentioned that in the conversation and pointed out that Flintkote had sold a very large amount of roofing on the job? A. We did.

Q. You sold about a million and a half square feet on it, didn't you?

A. I will have to do a little computing. I think they said it was 14 acres of roofing out there.

Q. Well, I don't care. I checked on the phone the other day.

A. Yes, it was a very large job. [1144]

Q. It was a very nice job? A. Yes.

Q. And it was performed by Associated Roofing and I believe another roofing company?

A. Acme.

Q. Acme, yes. And I think that you had your man Jim Marlowe out there assisting or advising or something? He is your architectural expert?

A. I doubt if Jim was ever on the job.

Q. Well, I have been misinformed then.

Now does that refresh your recollection any as to whether or not you mentioned that job?

A. No.

Q. You just don't recall?

A. As a matter of fact, this job was mentioned to a great many people at times. It was the biggest

(Testimony of Frank S. Harkins.)

thing in Southern California. Whether we spoke about it at that time or not I have no idea.

Q. Then I can't ask you any more particulars about that particular thing.

Now we will go back to the first part of your testimony, Mr. Harkins. You stated, I believe—and it has been testified before—that Flintkote entered the acoustical tile field by the acquisition of this Hilo plant in 1948? A. Yes. [1145]

Q. And at that time you didn't manufacture anywhere near what they call a full line, I mean all sizes? A. That is right.

Q. In 1951 you did have more or less of a full line, did you not?

A. We had added a great many things at that particular time. I couldn't say what all had been added, but it had been built up pretty rapidly.

Q. You were pretty well up with any of your competitors as far as a full line went at that time?

A. Thank you.

Q. In fact, I think there was only one that may have had an extra size that you didn't have, wasn't there? You were up with the trade anyway?

A. Yes, we thought we were.

Q. And when you first started in 1948 you testified that you looked over the situation, you didn't have a full line, you found that—stop me, you can correct me because my memory is memory only, Mr. Harkins—but that you looked over the distribution of acoustical tile not only here but else-

(Testimony of Frank S. Harkins.)

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(Testimony of Frank S. Harkins.)

where and you found that it was distributed by and large through established contractors?

A. Yes. [1146]

Q. And you decided to follow that general industry pattern yourself? A. Yes.

Q. And you did. A. Right.

Q. I take it that as a result of that decision you picked out Sound Control, Coast Insulating and Howard? A. No.

Q. No? A. No.

Q. Were they your first— A. No.

Q. —distributors?

A. No. I don't think we started to sell Coast until probably '49 or '50; probably nearer '50.

Q. After about a year.

A. It was the only thing we did initially. I tried to point out we had the decision to make initially whether we were going to throw acoustical tile into the general dealer line and distribute it through lumber dealers and hardware stores, et cetera, or restrict the sale of acoustical tile, as it had been historically the pattern of the industry, with the approved acoustical tile contractors. We decided to stay with the acoustical, approved acoustical tile contractors. We had no other approved sales policy at that time.

Q. By 1953 you had these three established, Sound [1147] Control, Coast, and Howard?

A. That is right, yes.

Q. When they took on your line they had been in a competing line from many years, hadn't they?

(Testimony of Frank S. Harkins.)

A. All of them, they all had other lines.

Q. In other words, Howard had U.S. Gypsum.

A. Yes.

Q. I think Sound Control had National Gypsum at that time?

A. And I think Fir-Tex, probably, at that time.

Q. And Coast had another line of tile.

A. Simpson.

Q. Simpson? A. Yes.

Q. When you awarded them this line of tile prior to '50 or in '50, did you have any assurance they would purchase Flintkote tile or would give Flintkote tile an even break with their line they already had? Did you have any arrangement at all along that line?

A. No. I mean no contractual arrangement. Obviously, you are trying to get the other fellow out. You are doing the best you can——

Q. What sort of a tacit arrangement or what agreement did you have? I mean, obviously, you wouldn't give it to them without any [1148] arrangement.

A. There was no arrangement. As I told you a minute ago, actually one of the things that made Dick Howard's business grow and develop like it did was that at first they had the U.S.G. line and they had incombustible tile, a very good one. The second thing was their fibertile was the type with the slots in it, which was not too popular.

As you know, undoubtedly, the Celotex Company had a 17—had a patent on the drillboard for 17

(Testimony of Frank S. Harkins.)

years. It wasn't until the expiration of those old patents that anybody got into the drillboard business.

Actually, from Howard's standpoint with his incombustible tile being a very popular one and very essential part of his program, and the unpopular slotted tile, it was natural for him to take our good drill tile with holes in it.

Q. Didn't U.S. Gyp. put out——

A. Ultimately.

Q. After or before you gave them——

A. No, after.

Q. After you gave them Flintkote?

A. Oh, yes.

Q. Did you have any idea, Mr. Harkins, whether or not Howard sells more U.S. Gyp. board than he does Flintkote board, since 1951?

A. I have no way of knowing.

Q. Have you ever checked on sales or had a check made? [1149]

A. No, we never asked to get in their books. We have our own opinions, but——

Q. How about Coast?

A. Simpson hole board.

Q. Simpson had hole board as soon as you did?

A. Yes, they were in the business before we were.

Q. A long, quite a number of years before?

A. Not very many. The patent didn't expire until——

Q. '37?

(Testimony of Frank S. Harkins.)

A. Oh, no, no. About '46. Those drill patents only expired a few months, actually—see, the drilling machine went in to Hilo about the fall of '47. It took them about a year to get the machine made.

I would say those patents expired in '46.

Q. Well, since then was—I mean Coast was handling Simpson drill board? A. Yes.

Q. By that you mean the acoustical tile with the holes in it? A. Yes.

Q. So we will all understand. Do you have any idea whether Coast sells more Simpson tile than Flintkote tile?

A. Well, I have asked that direct question of Charlie and he said it was about 50-50. That is all I could go on.

Q. Was that sort of what you expected from Charlie? [1150] A. Well—

Q. Yes.

A. Yes. Although at times we did more than that. For example, Simpson got in a very rough strike one time and were out for many, many months.

Q. That wasn't Charlie's fault.

A. At that time we supplied all the requirements in the area.

Q. That is what you call a split line basis, the same company will handle U.S. Gyp. and Simpson, on the one side, and Simpson and Flintkote, on the other side, and then maybe Flintkote and Fir-Tex on the other.

(Testimony of Frank S. Harkins.)

A. Yes. In other words, they handle two lines.

Q. You know these complaints have been referred heretofore as rumors, Mr. Harkins. When these contractors called your attention in any manner to the operations of the plaintiffs in Los Angeles—I mean called Mr. Lewis' attention,—I mean Mr. Lewis called your attention to it?

A. Yes.

Q. You stated they wanted a meeting down at Flintkote office and you refused such a meeting.

A. I didn't say that.

Mr. Black: I don't know that he testified anything about the Flintkote—

The Witness: I didn't say that. [1151]

Q. (By Mr. Ackerson): Let's see. I thought my notes said you did.

You didn't testify that Krause wanted a meeting?

A. I said that Mr. Lewis had told me.

Q. Mr. Lewis had told you?

A. Mr. Lewis had told me when I came back from San Francisco that Mr. Krause had called and wanted to get together and discuss the aabeta activity in the City of Los Angeles.

Mr. Lewis said, "I told Mr. Krause, under no circumstances would we or any representative of the company attend any such meeting with the contractors."

Q. Isn't it so that Mr. Krause said, "Not I want to, Coast Insulating wants to," but also Howard and Hoppe or Sound Control? That is, "We want a meeting here"?

(Testimony of Frank S. Harkins.)

A. I can only quote what I remember Sid telling me. I don't know what Mr. Krause said.

Q. Anyway, Lewis told them that under no circumstances would you have such a meeting.

A. That is right.

Q. When you got back from Seattle——

A. I wasn't in Seattle. Ragland was.

Q. North, was it?

A. I was in San Francisco.

Q. San Francisco. Well, they both get mad at each [1152] other for that mistake.

Anyway, when you got back from San Francisco, Mr. Harkins, you called up Charles Newport.

A. Yes.

Q. And you went out to the Brown Derby for luncheon. A. Yes.

Q. You said, "Now, look, Charlie, I don't want to discuss this aabeta business with you and I don't want you to discuss it with me." Is that what you said? A. Yes.

Q. And that is all the conversation about aabeta, I take it, that happened at that luncheon?

A. Yes. You can continue with the rest of my statement where I said, "Charlie"——

Q. What else did you say?

A. I said, "We are not going to discuss it." I said, "We are going to investigate the situation. It is being investigated now. When the facts are all in we will make up our own minds what we are going to do. It will be for the good of The Flintkote Company. Now, let's get it clear."

(Testimony of Frank S. Harkins.)

Q. That was before Ragland got back, wasn't it?

A. No, Ragland got back, I think, the same day of this luncheon.

Q. You got back before Ragland did?

A. I got back Wednesday. [1153]

Q. Ragland got back on Friday?

A. I think on Friday.

Q. Lewis reported to you—Sid Lewis reported to you first—

A. Yes.

Q. —immediately, I take it, when you got back?

A. Yes, when I walked in the door.

Q. Did Sidney Lewis tell you that he asked Baymiller to investigate it?

A. No. I will tell you what I think Sid said. He said that, "Under no circumstances would we or any representative of the company attend such a meeting," and Sid said, "I have told Baymiller to go out and call on Dick Howard, because Dick—" That is how we got in on the ground, was Browning—"I told Browning to go call on Dick Howard and see what all the shouting is about," or words to that effect. "I knew you would get hold of Mr. Newport."

Q. There had been some shouting?

A. The report was they were quite upset about this activity downtown.

Q. Otherwise, your luncheon meeting at the Brown Derby with Charles Newport, insofar as it pertained to the plaintiffs, was just a statement,

(Testimony of Frank S. Harkins.)

“Now, look, Charlie, don’t discuss it; I won’t discuss it with you. We are going to investigate [1154] it.”

A. That is correct.

Q. Did Mr. Lewis, when he first called your attention to these facts concerning the plaintiffs’ business, have any telephone number to call—did he make any attempt to call the plaintiffs about it directly? Did he tell you he did?

A. No.

Q. Did you ever make any attempt to call the plaintiffs in and talk to them about it directly?

A. No, I did not.

Q. You are positive that Thompson was in your office all the time this introductory meeting went on?

A. To the best of my knowledge, he sat right at my left all the time the meeting was going on.

Q. You are not positive. It has been testified that Mr. Thompson came in and introduced you and stayed a brief moment and went out.

A. I don’t think that is correct. To my knowledge, I think he was there all the time.

Mr. Black: I don’t think that is accurate, either.

Mr. Ackerson: I think that is what the plaintiffs testified. I am not talking about your clients.

Mr. Black: Maybe so.

Q. (By Mr. Ackerson): Now, do you have any knowledge about Flintkote, either through Mr. Ragland or your advertising department, consisting in anyway of the plaintiffs [1155] preparing their stationery and calling cards and so on?

(Testimony of Frank S. Harkins.)

A. That would be a normal procedure, but I don't have any knowledge of it.

Q. Mr. Black showed you this exhibit, Mr. Harkins, Defendant's Exhibit I, and attached to that is a calling card of Elmer Lysfjord.

Do you know where that card came from?

A. Well, it has the Flintkote seal on it. I presume we either gave him the dies or printed it for him; I wouldn't know.

Q. Was it on this exhibit when you examined it? A. Yes.

Q. It was there? A. Yes.

Q. Did you notice, Mr. Harkins, that here again on the calling card you have a Los Angeles telephone number and a San Bernardino telephone number?

A. Yes. That is actually where Ragland got the lead to locate the downtown warehouse, because, you see, there is no street address or anything on it, but there was a Los Angeles telephone number.

Q. He didn't call the telephone company——

A. He called this telephone number, if I remember his verbal report, and probably in here, too (indicating).

He called this telephone number, to see if he could find [1156] out where the so-called warehouse was.

Q. He didn't go down and knock on doors, did he?

A. He did, and came up with a carpet company, Abetter Carpet Company or Abetter Floor Com-

(Testimony of Frank S. Harkins.)

pany of some kind. Where he looked originally there was no aabeta—

Q. Down near the Bell Avenue address?

A. Some place in there. My recollection was he picked this card up at some general contractor's office and found the Los Angeles telephone number and called the number.

Q. What is your recollection on that, did Ragland tell you that? A. Yes.

Q. Are you sure of that?

A. That was in his verbal report to me.

Q. That is interesting, Mr. Harkins. When did he give you that verbal report? He gave you a verbal report and then a written report?

A. That is right.

Q. I believe this written report was submitted to you and you examined it somewhere around the date it bears? A. Yes.

Q. Mr. Harkins, let me ask you this: Was there any reason why you shouldn't have called these plaintiffs in, after you got this card, just called them into your office—you were their, really their bread and butter—and they [1157] would have come—was there any reason why you didn't just pick up the phone and say, "Lysfjord and Waldron, come in here, I want to talk to you"?

A. Yes, there was a very good business reason. We had an arrangement with these gentlemen to do business in San Bernardino. They had flagrantly violated it. They had opened the warehouse in town. Even the material shipped to San Bernardino had

(Testimony of Frank S. Harkins.)

been backhauled down here, because it was in the downtown warehouse.

They were out quoting all over this area and I said to the boys, "I don't think we have any option. I don't choose to do business with people that have abrogated the agreement so readily."

Q. Did you have any hesitancy in telling them if you felt that way? You still don't answer my question. Why didn't you pick up the phone and say, "Lysfjord and Waldron, I want to talk to you. Come down here. I want to tell you you have abrogated your agreement"?

A. I told Thompson to go tell them that. [1158]

Q. You told Thompson, Baymiller and Ragland to traipse out to the house and out to their plant and wait for them, didn't you?

A. No, I told them to go cancel the agreement.

Q. Well, that is the way they did it. You knew that, didn't you?

A. They went down to the house, didn't they?

Q. Yes, all three of them.

A. Did Ragland go too?

Q. Yes, sir.

A. I thought it was just Thompson and Baymiller.

Q. Now you did call Thompson, Baymiller and Ragland into your office and you told them to go down and cancel this agreement, didn't you?

A. I did not.

Q. You didn't call all three of them into your office?

(Testimony of Frank S. Harkins.)

A. They were all there, I mean, Mr. Thompson and Mr. Baymiller and Mr. Lewis were all present when we reviewed the facts of this case and reached the conclusion that we were going to remove them from the list of approved acoustical contractors and cease to sell them except on a termination basis.

Q. That was just shortly—

A. And I said to Mr. Thompson, "This is your job, you handle it." [1159]

The Court: We will have a short recess.

(Short recess.)

The Court: Proceed.

Q. (By Mr. Ackerson): At recess time, Mr. Harkins, I think I was asking you whether or not you called Ragland, Baymiller and Thompson into your office for a conference prior to having one or all of them go out to terminate the plaintiffs' source of supply. A. Yes.

Q. And I believe you said that you called Lewis and Thompson in. Did you call Baymiller in?

A. I don't know. I think, I am sure they were all there at this final discussion. Whether they called or my secretary called or whether Ed went to get them, I don't know.

Q. But all three of you were in there?

A. That is my recollection.

Q. And that would be Lewis, Thompson and Baymiller? A. Yes.

Q. Now did you at any time tell Thompson, Baymiller and Ragland to go down and do the job?

(Testimony of Frank S. Harkins.)

A. I did not.

Q. Before I forget it, you stated you were in business, in the materials field now, is that correct?

A. Yes.

Q. What building materials do you handle, Mr. Harkins? [1160]

A. The building materials of Pabco and Flintkote.

Q. So you are still related with the company in that manner.

A. Related to both of them.

Q. And a part of your testimony on direct was that this finding out that the plaintiffs had a warehouse in Los Angeles caused a lot of commotion, is that right?

A. I don't think I said that. I think I said, Mr. Ackerson, that their activity when I got back from San Francisco apparently had created some commotion, according to the report I got from Mr. Lewis.

Q. Yes.

A. The physical finding of the warehouse down there was on our investigation and caused us no commotion. It was merely a part of the additional facts that we were getting.

Q. In other words, it was the fact that they were doing business?

A. That is right.

Q. If they hadn't been doing business the warehouse would have made no difference?

A. (No response.)

Q. I have only a few other questions, Mr. Har-

(Testimony of Frank S. Harkins.)

kins. Did you testify that neither Newport, Krause, Howard nor Hoppe ever came to the Flintkote offices while you were there that you know of in connection with this matter? [1161]

A. Not that I know of. I said they were not in my office and not in the building to my knowledge when I was there.

Q. But you have a private office, or you had a private office, did you not? A. Yes.

Q. And Mr. Thompson had a private office?

A. Yes.

Q. Did Mr. Baymiller?

A. Yes, right alongside.

Q. Ragland did not? A. No.

Q. Now you made an interesting statement, if I recall it. You said that when you got back from San Francisco and was told by Mr. Lewis that these activities of the plaintiffs in Los Angeles, that you did something—I believe you said you called Thompson in to discuss the matter?

A. I don't recall that I said that, Mr. Ackerson. I think I talked to Sid and he went on with his story about the request that he had had to attend the meeting or get a meeting together and he had rejected the idea, and I said, well, that is perfectly correct.

Q. I see. But later you did, didn't you? You called Thompson or somebody else in, I believe?

A. Undoubtedly later, Mr. Ackerson. I talked to Mr. Thompson, Mr. Baymiller, Mr. Lewis and Mr. Ragland, and we [1162] assigned Mr. Ragland to

(Testimony of Frank S. Harkins.)

the problem of investigating some of the stories to see what we could find out.

Q. But you didn't know that Mr. Baymiller—you did say that you knew that Mr. Baymiller had himself made an investigation?

A. I knew that Mr. Lewis told me, as I recall it, in that same conversation that he had sent Mr. Baymiller over to see Mr. Howard, and that he said I knew you would see Mr. Newport.

Q. Did he say that he had also sent Mr. Baymiller over to see Mr. Newport? A. No.

Q. Did he say that he had also sent Mr. Baymiller over to see Mr. Hoppe?

A. Not that I recall. He most likely did in that conversation.

Q. I am not quite certain of this statement of yours—you can correct me if you wish and we will let the record decide tomorrow—but I understood you to say that you called these people in to talk to them to satisfy your own mind about this territory question. Did you say that?

A. Yes. I didn't say when.

Q. No, you didn't say when, but you called Ragland or Baymiller or some of them in to satisfy your own mind where these people would operate? [1163]

A. Yes. I went over it with Mr. Thompson and Mr. Baymiller very carefully, the various discussions they had had with these people and the luncheons they had had, and what their definite under-

(Testimony of Frank S. Harkins.)

standing was or had been before they brought them into my office for them to make the deal. [1164]

Q. In other words, you wanted to clarify your own mind on it, is that right?

A. I wanted to be sure, yes.

Q. All right.

The Court: Did you ever have a written memorandum of any kind with these plaintiffs, regarding the area in which they were to distribute your products?

The Witness: No, sir, not in writing.

Q. (By Mr. Ackerson): So that, I take it then, Mr. Harkins, that the investigation made was one investigation that was made by Mr. Baymiller, and you had a conversation with Mr. Newport about this same subject matter of the plaintiffs' business in California, and then Ragland was delegated by you to investigate? A. That is correct.

Q. And on top of that Lewis had received these communications and transmitted them to you, that is, communications from the contractors?

A. That is correct.

Q. All of those things happened? A. Yes.

Q. Now, did you say in your direct examination, in connection with your luncheon at the Brown Derby with Mr. Charles Newport, that whatever decision Flintkote made would be in Flintkote's best interests? Didn't you say that? [1165]

A. Yes.

Q. Now, I have only one more general question. Why, Mr. Harkins, in place of all the conferences,

(Testimony of Frank S. Harkins.)

investigations and so forth, if the plaintiffs were not supposed to operate in Los Angeles, why didn't you call them up and tell them so or write them a business letter terminating the deal? You were the top boss. Why didn't you do that?

A. I don't think that that has any great bearing on the thing, Mr. Ackerson.

Q. Can you answer the question?

A. Yes. Why didn't I? Because it is Mr. Thompson's district. He is the district manager.

Q. Why didn't you have Mr. Thompson call them in or write them a letter and say, "You have violated your agreement. We can no longer sell you"?

A. Generally speaking, there is no written contract with anybody, in the first place. Generally speaking, I would prefer to have the people themselves who made the negotiations and carried on the negotiations go down and terminate the negotiations.

Q. Did it occur to you, Mr. Harkins, that maybe, along the line you just stated, that you might, since you listened to the contractors' complaints, that you might have given these plaintiffs a hearing along the same line, the same philosophy you have just spoken? [1166]

A. No, it was a simple matter with me, Mr. Ackerson, whether or not they were operating in accordance with the agreements and understandings we had or they weren't. We assured ourselves they were not, and I asked to have the thing terminated.

(Testimony of Frank S. Harkins.)

Q. The only question was whether or not they were operating in Los Angeles, wasn't it?

A. That is correct. They could have stayed in San Bernardino.

Q. That was the only question you were involved with? A. Yes.

Q. Why didn't you ask them whether they were—there was never any denial when Bob Ragland got down there—

A. Mr. Ackerson, I didn't have any of the personal negotiations with the people, from the start to finish. I had probably a 15 minutes' conversation. It was strictly a Los Angeles district sales matter.

Q. Why didn't you have Mr. Thompson do it? You delegated him. Why didn't you ask Mr. Thompson to call them up? Why didn't you do that?

A. To ask them if they had a warehouse?

Q. Ask them if they were operating, whatever you wanted to know about their Los Angeles operation. Why didn't you have Mr. Thompson do that?

A. We established that fact, sir.

Q. Why didn't you establish it the simple way? [1167]

A. That is a matter of judgment.

Q. Isn't it a fact, Mr. Harkins, after this commotion you were talking about you had to have some excuse to fire them? A. No.

Q. Let me ask you about this purported report of Ragland's, the written report after the oral report.

In this report, and I call your attention to the

(Testimony of Frank S. Harkins.)

fact you just stated the sole question was whether they were operating in Los Angeles, is that correct?

A. That is correct.

Q. Why were you interested? Why did Mr. Ragland report to you that—I am reading paragraph 4 of his report—and I will show it to you——

“The aabeta co. has not sold the Lewis Downer Company of Riverside any Flintkote tile to be installed on the Orange Coast College job.”

What did that have to do with aabeta co.’s operating in Los Angeles? What has that to do with it?

A. I have no idea.

Q. Let me call your attention to something else. Apparently Flintkote had an inquiry from the Stanton Lumber Company about a bad check of aabeta. What did that have to do with the question you were interested in? A. Not a thing. [1168]

Q. There is another paragraph here. No. 3.

“Mr. Waldron resigned his position as salesman of the R. W. Downer Company right after the first of the year. He did not abscond with Downer Company job files and was not fired for inefficiency. His rate of pay was in the neighborhood of a thousand dollars per month. This pay was strictly derived from commissions.”

What did that have to do with their operation in Los Angeles, Mr. Harkins?

A. Nothing at all.

Q. Did you request Mr. Ragland to run down these items?

A. I never heard of them until I saw that report.

(Testimony of Frank S. Harkins.)

Q. You read the report? A. Yes, sir.

Q. And you say you read it on February 15th or thereabouts? A. Or thereabouts.

Mr. Ackerson: That is all.

Mr. Black: I just have one or two questions. [1169]

Redirect Examination

By Mr. Black:

Q. On cross-examination, Mr. Harkins, counsel commented to the jury but didn't ask you about this page of the report about schedules and estimated projected policy. You will observe that the top of the page shows aabeta company, Los Angeles, California. Did you observe that address at the time, or do you remember?

A. No. I don't recall ever having seen the specific address. I don't think it would have struck me if I had.

Q. Why not?

A. Because they had no place of business yet anyhow.

Q. Now on this Convair job at Pomona, I think you said that your company and you did not know about that job at the time.

A. We were well aware of it.

Q. What was your information with respect to the requirement of the specifications for acoustical tile in that construction?

A. The specifications originally came out calling for a hundred per cent incombustible material.

(Testimony of Frank S. Harkins.)

Q. Does Flintkote manufacture any incombustible material? A. No.

Mr. Black: That is all. [1170]

Recross-Examination

By Mr. Ackerson:

Q. Do you deny, Mr. Harkins, calling that job to the attention of the plaintiffs when they were in your office in this introductory meeting?

A. Yes, I deny—I don't deny that I did. I said I had no knowledge of it. I don't recall discussing the Convair job with them at all.

Mr. Ackerson: That is all.

Mr. Black: Thank you, Mr. Harkins.

(Witness excused.)

Mr. Black: I will call Mr. Heller.

ROBERT WILLIAM HELLER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please.

The Witness: Robert William Heller.

Direct Examination

By Mr. Black:

Q. What is your present occupation, Mr. Heller?

A. I am a salesman for Fibreglass Engineering and Supply Company. [1171]

(Testimony of Robert William Heller.)

Q. How long have you held that position?

A. Since March of this year.

Q. Where were you employed prior to that time?

A. With The Flintkote Company.

Q. In what capacity?

A. In sales promotion on the Canec line of insulating products.

Q. How long did you hold that position with Flintkote?

A. From January, 1949, until February of this year.

Q. Continuously? A. Yes, sir.

Q. In general, what was the nature of your duties?

A. To work with the factory in the development of insulating products, that is, the factory at Hilo, and to supply the necessary technical data and advertising data to the salesmen in the field so that they could do a sales job.

Q. Did you have any contacts with the plaintiffs in this case or either of them?

A. Yes, on two different occasions.

Q. What was the first occasion?

A. The first occasion was in the office of The Flintkote Company. The plaintiffs were in the accompaniment of Bob Ragland, and Bob Ragland stopped me as I was passing through the office and introduced me to the two gentlemen, and told me that they were going to handle acoustical products [1172] in San Bernardino County.

Q. About when was that, if you can recall?

(Testimony of Robert William Heller.)

A. I can't recall the date.

Q. That was just an introduction?

A. Essentially so, yes. We talked there in generalities for a few moments and Mr. Ragland went on to explain to them that in case they needed any help at the office in ordering, and so forth, their products, that I was available to them there and would do what I could to help them.

Q. Nothing else of a business nature was transacted at that meeting? A. No, sir.

Q. When was your next contact with the plaintiffs?

A. The next contact was on the occasion of the delivery of the first shipment of Flintkote acoustical tile to the aabeta company's warehouse in San Bernardino.

Q. With whom did you go, if anybody, on that trip?

A. Mr. Ragland and I went out to San Bernardino for another purpose, to inspect an insulating tile job that was going on, and while we were there we went over to the warehouse of aabeta.

Q. Whom did you see on that occasion?

A. Mr. Waldron was there at the warehouse.

Q. Did you observe the tile being discharged from the automotive equipment? [1173]

A. Yes, sir. There was, as I recall it, a Water-Land truck there unloading acoustical tile in this warehouse.

Q. Did you have any idea how many pieces of motor equipment you saw?

(Testimony of Robert William Heller.)

A. As I recall it, there was a large truck and a trailer.

Q. Did you have any extended discussion with the plaintiffs on that occasion?

A. Only in generalities, as far as establishing the business there in San Bernardino. Mr. Waldron at that time was busy engaged in fixing up an office in the front of this warehouse, and we talked briefly about that, nothing as far as the operation of the business is concerned.

Q. What was the next occasion you had to have any business contact with any of the aabeta operations?

A. Well, that is the only time that I recall having had any direct contact with aabeta.

Q. Did you have any occasion in connection with Flintkote's business to do anything that related to aabeta or aabeta's operations?

A. Not that I recall.

Q. Did you have anything to do with talking to distributors of products of The Flintkote Company with reference to aabeta?

A. Well, I did go out to Coast Insulating Products Company [1174] in the accompaniment of Mr. Baymiller one afternoon, and we talked there with Mr. Krause and Mr. Newport in Mr. Newport's office.

Q. And what, if anything, do you recall that was said generally at that meeting?

A. Well, both Mr. Krause and Mr. Newport were

(Testimony of Robert William Heller.)

quite upset over the fact that Flintkote Company was selling aabeta. [1175]

Q. What, if anything, was said by you or Mr. Baymiller on that occasion?

Mr. Ackerson: Before the question is answered, this time, Your Honor, I am going to object to it as hearsay.

Mr. Black: Well, if the Court please, this has to do with the issue of the motives of the defendant in this case, what it was actuated by in its action with respect to the plaintiffs, whether or not there were threats or boycott language or anything of the sort.

We are not using it in the hearsay sense. We submit it is not hearsay. It is part of the transaction that is under challenge in this lawsuit.

Mr. Ackerson: It is talking about conversations. I still think it is hearsay, Your Honor.

The Court: You are not trying to prove the facts related in the conversation.

Mr. Black: Certainly not.

The Court: Overruled.

Q. (By Mr. Black): What was said at that meeting by you or Mr. Baymiller, if you remember?

A. I can tell you, as I remember the conversation.

Q. That is what I am talking about.

A. Mr. Crouse and Mr. Newport were upset because Flintkote was selling aabeta. They said that they had been working in the San Bernardino area there in solicitation of [1176] acoustical tile work,

(Testimony of Robert William Heller.)

and that they had intended to open up a branch office in that area, to properly service the accounts.

Q. What did you or Mr. Baymiller say on that occasion?

A. Well, both Mr. Baymiller and I said that the decision was not with us, we did not have the authority to make a decision as to whether the Flintkote Company sold aabeta or not. That that decision would have to come from Mr. Harkins.

Q. At that time was there any threat made by Mr. Crouse and Mr. Newport about boycotting the Flintkote Company if they did not discharge these people?

Mr. Ackerson: Objected to as calling for a conclusion.

Q. (By Mr. Black): Was there anything said about boycotting? A. No.

Q. Was there anything said about terminating relations with The Flintkote Company if that was not done by The Flintkote Company, with respect to the plaintiffs? A. No.

Q. Did Mr. Newport state that he would spend forty or fifty thousand dollars to see to it that not another foot of Flintkote tile was sold in this area if Flintkote did not discharge the plaintiffs?

A. I did not hear that.

Q. Did you ever hear of any such statement?

A. No, sir. [1177]

Q. What else did you hear on that occasion?

A. Well, after we left Coast Mr. Baymiller and I went over to the offices of Sound Control.

(Testimony of Robert William Heller.)

Q. Whom did you see there?

A. We went to Sound Control and went in Mr. Hoppe's office, and Mr. Hoppe was there, Mr. Howard, Dick Howard, was there, and I believe Mr. Tomlinson of Sound Control was there.

Q. What, if anything, was said by these people, if you remember, at that meeting?

A. Mr. Hoppe was upset, of course, that Flintkote Company was selling aabeta.

He said that he felt that we should have consulted him about appointing another acoustical contractor in the Southern California area, before selling an additional account.

Q. What did you say, if anything?

A. I told Mr. Hoppe that we did not have the authority to make any decisions, as to who was or who was not to be appointed as an acoustical tile contractor.

Q. Do you recall anything else that bears on this thing at that time?

A. Mr. Hoppe then, to continue that conversation, Mr. Hoppe wanted to know who was in charge at The Flintkote Company, that he could talk to.

Q. And what did you say? [1178]

A. We told him that Mr. Harkins was. And he said he would like to talk to Mr. Harkins.

Q. Did either Mr. Howard or Mr. Hoppe state that they would stop doing business with Flintkote if aabeta were not discontinued?

A. No, sir.

Q. Did you have any notice or knowledge of any

(Testimony of Robert William Heller.)

plan or scheme among the acoustical tile contractors to allocate bids in the Los Angeles area?

A. No, sir.

Q. Or in the same connection to fix prices?

A. No, sir.

Mr. Black: You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. Did you also go out with Mr. Baymiller to the Howard Company? A. No, sir.

Q. In other words, when you got out to Mr. Hoppe's you found Mr. Howard there, is that it? Is that R. E. Howard?

A. That is right, sir, he was.

Q. He was at Hoppe's business then?

A. That is right.

Q. The two of you talked to both of them, both Howard and Hoppe, did you? [1179]

A. Mr. Howard was present.

Q. What did Mr. Howard have to say, about the same thing?

A. Mr. Howard, to my knowledge, did not make any comment.

Q. Now, Mr. Heller, do you know whether Mr. Baymiller went out to the Howard Company that same day? A. No, sir.

Q. Do you know whether he ever went out there?

A. No, sir.

Q. But you attended Mr. Baymiller when he

(Testimony of Robert William Heller.)

went out to Sound Control and there you met both Hoppe and Howard? That is who you had your conference with, you stated? A. That is right.

Q. Mr. Hoppe, I believe you said, talked about Sound Control was going to put a branch office in San Bernardino? A. No, sir, that was——

Q. Howard? A. No, sir.

Q. Who was that?

A. That was Coast Insulating.

Q. Coast. That was Mr. Newport?

A. Mr. Crouse made that statement.

Q. Mr. Crouse. So that when you and Baymiller got out to Coast Insulating you not only found Mr. Newport but you found Mr. Crouse there, too, is that right? [1180] A. That is right.

Q. And the conference, rather than being just with Newport, was with both Crouse and Newport, is that right? A. That is right. [1181]

Q. Do you know whether or not Mr. Baymiller took any other trip out to Sound Control where he just saw Mr. Newport?

A. I don't think Mr. Baymiller ever saw Mr. Newport in Sound Control. Mr. Newport is at Coast Insulating.

Q. I mean Coast. Thank you. Do you know whether Mr. Baymiller ever took any other trip out there for this same purpose when you weren't there? A. No, sir, I do not.

Q. Do you know whether Mr. Hoppe ever had his conversation with Mr. Harkins that he requested? A. I couldn't answer that.

(Testimony of Robert William Heller.)

Q. But he did request it? A. He did.

Mr. Ackerson: That is all.

Mr. Black: That is all.

(Witness excused.)

Mr. Black: Call Mr. McAdow.

HAROLD H. McADOW

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, sir?

The Witness: Harold H. McAdow, M-c-A-d-o-w.

Direct Examination

By Mr. Black:

Q. What is your occupation, Mr. McAdow?

A. Credit manager.

Q. For what company?

A. For the Flintkote Company.

Q. How long have you held that position?

A. Since 1948.

Q. Continuously? A. Yes.

Q. What contact in that connection, if any, did you have with the plaintiffs in this case?

A. Mr. Ragland brought the plaintiffs in to me with a financial statement for the purpose of purchasing a carload of acoustical tile on credit.

Q. Did you examine the financial statement?

A. Yes, I did.

Q. I show you, Mr. McAdow, Plaintiffs' Exhibit

(Testimony of Harold H. McAdow.)

44 and ask you if that is the document to which you refer?

A. (Examining document): Yes.

Q. Can you place the time when that meeting took place?

A. I would say it was in December of '51.

Q. Attention has been called, Mr. McAdow, in this case to the fact that this statement shows the aabeta company, Los Angeles, on the cover and one of the inside pages. Do you [1183] recall whether or not you particularly observed that at the time you saw the financial statement?

A. I didn't particularly observe it, no sir.

Q. Did you call it to anyone's attention at the time?

A. You mean the Los Angeles name?

Q. Yes. A. No.

Q. What, if anything, did you do with respect to the credit of the plaintiffs in connection with their order for tile?

A. Well, when they were brought in they were introduced and I was given this statement and we talked about their plans for starting a new business, acoustical tile contractors, in San Bernardino, and they stated that they wanted to buy an opening order of a carload of acoustical tile for delivery to San Bernardino, and we discussed the payment terms and we agreed, after this examination, and the history of their experience and all, that we would permit them to our regular terms on this first purchase of acoustical tile with the understand-

(Testimony of Harold H. McAdow.)

ing that they pay for it and discount the invoice when it was due.

Q. Was there anything said by the plaintiffs or either of them on that occasion about doing business in Los Angeles? A. No.

Q. Or by you? [1184] A. No.

Q. Did you have any further contact with the plaintiffs?

A. I might have had a contact with them, I don't recall exactly. They might have brought in a check in payment of the order. I believe I discussed later a purchase over the telephone with them. That is about it.

Q. And that is about all you recall on this matter? A. Yes.

Mr. Black: You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. What time do you place this meeting—this is the same meeting when they were introduced to Mr. Harkins, wasn't it? A. I believe so.

Q. This was the same meeting when they were notified that they were going to get a line of Flintkote tile, is that right?

A. We discussed whether or not their first order could be purchased on credit terms.

Q. They didn't present any order then, did they?

A. Not at that time.

Q. But it was this same meeting, was it not,

(Testimony of Harold H. McAdow.)

when they were introduced to Mr. Harkins for the first time? You said they were introduced to Mr. Harkins. [1185]

A. I assume that it was the same day. I didn't know they had been in to talk to Mr. Harkins. Mr. Ragland brought them in to me.

Q. Mr. Ragland brought them in to you, not Mr. Thompson? A. Yes.

Q. Where were they when Mr. Ragland brought them in to you? Did he bring them in to you from Mr. Harkins' office?

A. I don't know. They came in from the outside of my office. That is all I know. I don't know what direction they came in from.

Q. You don't know where they came from?

A. No.

Q. But it wasn't Thompson or Baymiller that brought them in? A. It was Mr. Ragland.

Q. You say this meeting was some time, what, the first part of December or the latter part of December or what?

A. As I recall, it was the latter part of December.

Q. Could it have been in November?

A. I don't believe it was.

Q. Do you know when they placed their first order?

A. You must have a ledger sheet around here some place that shows that. I mean, that would be the conclusive evidence of when they placed it. [1186]

(Testimony of Harold H. McAdow.)

Q. They didn't place an order that day, though, did they? A. No, not to my knowledge.

Q. You say they merely inquired about financing a future order? A. That is right. [1187]

Q. Did they say they had any place to have it delivered or anything?

A. They were talking about a place, a warehouse, I believe, in San Bernardino.

Q. You believe that?

A. That was just mentioned in the discussion.

Q. Did they give you an address?

A. Not at that time, no.

Q. Did they say they had a place there?

A. I believe they were negotiating for a warehouse at that time.

Q. They were negotiating? A. Yes.

Q. Did they say anything about a place in Los Angeles they had at that time? A. No.

Q. Did they say they had any place at that time?

A. I don't recall that they did.

Q. You say Mr. Ragland called up and said, "Mr. McAdow, I want you to meet Mr. Lysfjord and Mr. Waldron. They are going to distribute our tile in San Bernardino," is that your statement?

A. Yes.

Q. Did they say anything about Los Angeles?

A. No. [1188]

Q. In other words, I take it, they didn't state they were not going to distribute it in Los Angeles, too, did they?

(Testimony of Harold H. McAdow.)

A. There was no question, San Bernardino was the only place that was mentioned.

Q. You were shown that exhibit, Plaintiffs' Exhibit 44, Mr. McAdow. Did you see that exhibit before or after Mr. Harkins did?

A. I don't know.

Q. Did you examine the exhibit carefully as a credit manager down there?

A. I looked it over, yes.

Q. You stated you didn't see either of the two places where Los Angeles appears on it?

A. I made no special note of it at that time, because they had no place of business.

Q. They had no place of business you knew of at that time then?

A. They couldn't have had if they were negotiating for a place of business.

Q. They couldn't have had if they were just notified that today they could get tile, either, could they? A. Will you repeat that?

Q. Ordinarily, they wouldn't have had a place of business, would they, if they just had been notified a minute [1189] or two before they were going to get some Flintkote tile?

A. I don't follow your question.

Q. I will withdraw it. I don't blame you. But you say San Bernardino was mentioned?

A. Yes.

Q. You are credit manager and a pretty careful one, aren't you? You have been described as a pretty cautious man here. A. Thank you.

(Testimony of Harold H. McAdow.)

Q. Are you? You examined this very carefully as a cautious man, did you?

A. I read it over, yes.

Q. I take it it was your understanding they were just going to operate in San Bernardino, wasn't it?

A. That is right.

Q. You mean to say you looked this thing over and didn't see this address here and you didn't see this one over here (indicating) on their prognosis of their future operations? You didn't see either of those?

A. I made no particular note of the Los Angeles. They gave their residence addresses, they were both living in Los Angeles.

Q. Yes, but that appears two other places. That is a beta co., Los Angeles, both of the places I am calling to your attention. You didn't notice that? [1190]

A. No, I made no particular note of it.

Q. If you had noticed it, I suppose you would have notified Mr. Harkins these people were in the wrong bailiwick, wouldn't you?

A. They hadn't started their operations in San Bernardino at that time.

Mr. Ackerson: That is all.

(Testimony of Harold H. McAdow.)

Redirect Examination

By Mr. Black:

Q. One question further, Mr. McAdow. Referring to the financial statement, the very first page, I will call your attention to the fact it states, "Statement of financial condition as of December 1, 1951."

Does that help you with respect to the date of this in connection with counsel's suggestion that it might have been November?

A. Yes, I think that establishes it would have to be after December 1st, yes.

Mr. Black: That is all.

(Witness excused.)

Mr. Black: I will call Mr. Krause.

The Court: You have taken the oath here once, haven't you?

Mr. Krause: Yes.

The Court: That oath still applies. [1191]

Mr. Black: Still a good oath.

The Court: Is this going to be extended testimony?

Mr. Black: I don't think it will be very long on direct. I suspect it might be longer on cross.

The Court: Let's go to the direct then.

GUSTAV KRAUSE

called as a witness by the defendants, having been previously sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Black:

Q. Mr. Krause, what is your present occupation?

A. I am manager of the acoustical and insulating departments of Coast Insulating Products.

Q. How long have you been acting in that capacity?

A. When I came to Coast Insulating in July of 1950, I was the manager for that company.

Q. And have you remained continuously with that company, to the present time?

A. Yes, sir.

Q. Is Mr. Newport connected with that company now? A. No, sir.

Q. When did he sever his connections with the company?

A. He sold out his company in March of 1954.

Q. Where is Mr. Newport now?

A. I believe he is in Europe. [1192]

Q. What kind of tile does Coast Insulating Company carry?

A. They carry two lines, Simpson acoustical tile line and the Flintkote line. [1193]

Q. Was that true in the summer of '51 through the spring of '52? A. Yes, sir.

Q. What was the occasion when you first learned of the activities of Messrs. Lysfjord and Waldron

(Testimony of Gustav Krause.)

in business as aabeta company in the Los Angeles area?

A. One of my salesmen reported to me that we had lost a job to the aabeta company and I believe the general contract was Contracting Engineers. It was a market job.

Q. When was that, if you can recall?

A. 1951, I believe. I don't know the exact date?

Q. Could it have been the spring of 1952?

A. It was during the time, right after that when the aabeta company, I found out, had the acoustical line for Flintkote, so whatever date that was would tie in with it.

Q. What, if anything, did you do in connection with this, Mr. Krause?

A. As I recall the job, it was a Flintkote specification, and our people had been working on the job, and I immediately got on the phone and called the Flintkote people up because it was my understanding that they took the job on a Flintkote specification.

So I contacted the Flintkote office and tried to get in touch with Bob Ragland, and he was out of town, so I got hold of Sid Lewis, and I said, "Mr. Lewis, have you opened [1194] another acoustical contractor in the Los Angeles area, or what is happening around here?" It was my understanding that there were three acoustical contractors, and we ended up with aabeta company, which is a new company, and I didn't even know who they were actually, with the Flintkote line.

(Testimony of Gustav Krause.)

So then Mr. Lewis informed me in no uncertain terms that they had opened up a new acoustical contractor but not for the Los Angeles area, they had opened up an acoustical contractor called the aabeta company for San Bernardino and Riverside Counties.

And I said, "Well, we are working out in San Bernardino and Riverside and it was my understanding from the Flintkote Company that there would be three acoustical contractors for Southern California." Naturally I was upset to find we had other competition in the market.

Q. What did Mr. Lewis say to you in response to that?

A. Well, he became quite heated. I was rather amazed to find that we were customers and to have our manufacturers jump through the telephone at us, and it ended up by his telling me to go to hell. I will never forget that. I know that to be a fact.

Q. Did you have any further discussion with Mr. Lewis on that occasion or did you call him back or what happened?

A. I don't recall having any further discussion with him on that occasion. [1195]

Q. Well, did Mr. Lewis say, politely or otherwise, that the matter would be investigated or something of the sort, or something would be done by Flintkote in the way of finding out what the facts were?

Mr. Ackerson: If Your Honor please, I haven't objected to leading questions for a long time, but I

(Testimony of Gustav Krause.)

think this is leading and I will object to it. I want the witness to answer.

Mr. Black: It might well be. I will put it this way——

The Court: Rephrase it.

Q. (By Mr. Black): Was anything said by Mr. Lewis with respect to what the company's actions would be, if any?

A. No, the only thing Mr. Lewis said that the Flintkote Company had the right to open up or close down any distributor that they wanted to.

Q. Did you make any further request at that time of Mr. Lewis?

A. No, I decided that it was time for me to cool off and wait until Mr. Ragland got back in town to find out what the entire story was.

Q. Did you later have any discussions with the Flintkote people or any of their employees?

A. Yes, sir.

Q. When? [1196]

A. I believe when Mr. Ragland—I don't know the exact date; it was right during that period—when Mr. Ragland came back, I had left a message for him to call me and he came over and called on me at my office, and I said, "Bob, what is it? What have you done? Why have you opened up another acoustical contractor when it was the understanding of me, and I believe the other two, Flintkote acoustical contractors that there would only be three acoustical contractors in the area?"

And he said, "Well, the Flintkote Company de-

(Testimony of Gustav Krause.)

cided that they needed a new contractor in San Bernardino and Riverside area and both Walter Waldron and Elmer Lysfjord were the type of people to handle that area.”

I said, “Fine, but why didn’t you tell us about it? At least we should know that that is going to happen.”

And I recall very vividly giving the example that if I had a board franchise or distributorship on one street corner and had had it and worked at it for many years in trying to build up my business, and then the Ford Motor Company opened up another distributor right across the street from me, which in effect that is the way it was, why naturally I would be awfully upset. I think that is a prerogative of every businessman.

Q. What did Mr. Ragland say to you?

A. He was very upset, the same as I was, and he said, [1197] “Well, the only thing we can do,” he said, “is if Waldron and Lysfjord are bidding in the Los Angeles area we will have to check into it,” and he said, “our agreement was for them to bid in San Bernardino and Riverside Counties only.”

Q. Did you have any further discussions with any other Flintkote representatives on this score?

A. Shortly after that both Mr. Baymiller and Bob Heller came to our office. At that time I happened to be there—

Mr. Ackerson: Your Honor please, I want a continuing objection to this line of testimony between alleged co-conspirators as hearsay.

(Testimony of Gustav Krause.)

The Court: Overruled.

Q. (By Mr. Black): You may proceed, Mr. Krause.

A. What was your question?

Mr. Black: Read it, Mr. Reporter.

(The question referred to was read by the reporter as follows: "Q. Did you have any further discussions with any other Flintkote representatives on this score?")

The Witness: Well, shortly after that both Mr. Baymiller and——

Will you read that again?

(The question referred to was reread by the reporter as follows: [1198] "Q. Did you have any further discussions with any other Flintkote representatives on this score?")

The Witness: Do you mean employees of The Flintkote Company?

Mr. Black: Yes, sir.

The Witness: Yes, shortly after that Mr. Baymiller and Mr. Heller came to our office, and I happened to be there at the time, and they came unannounced, and Mr. Baymiller, during the conversation, lost his temper in Mr. Newport's office and said that The Flintkote Company had a right to their own business and they could handle or see fit to give out any distributorship, franchises, or take any away that they wanted. And Mr. Baymiller and Mr. Newport both parted feeling pretty hot. [1199]

(Testimony of Gustav Krause.)

Q. Did Mr. Newport state at that occasion that if Flintkote didn't discharge these people he would stop doing business with Flintkote?

A. Knowing Mr. Newport as well as I do for many years, I don't think——

Mr. Ackerson: Your Honor please, I object to that.

Mr. Black: That is perfectly correct.

Mr. Ackerson: That is non-responsive.

Q. (By Mr. Black): The question was did he or didn't he? A. What was the question?

Q. The question was whether Mr. Newport stated on that occasion that if Flintkote did not discharge these plaintiffs Mr. Newport would stop doing business with Flintkote. A. No, sir.

Q. Do you recall Mr. Newport ever saying, in your presence, that if Flintkote did not discharge these plaintiffs he would spend forty or fifty thousand dollars to see to it that not another foot of Flintkote tile was sold in the Los Angeles area?

A. No, sir.

Q. Did you ever hear of his making such a statement? A. No, sir.

Q. Did you personally state at any of your discussions with the Flintkote people that if they didn't discharge these [1200] people you would boycott them? A. No, sir.

Q. Did you ever hear the word "boycott" used in that connection? A. No, sir.

Q. By any of your employees? A. No, sir.

(Testimony of Gustav Krause.)

Q. Did you attend any meeting of the acoustical tile contractors dealing in Flintkote products relating to this aabeta situation? A. No, sir.

Q. To the best of your knowledge, was there any such meeting?

A. The only meeting that I know of was the meeting between Mr. Baymiller and Mr. Heller, Mr. Howard and Mr. Hoppe in Mr. Hoppe's office.

Q. You weren't there personally?

A. No, sir, I was not there.

Q. That is the only one you heard of, is that it?

A. Yes, sir.

Q. You don't know anything about that?

A. I don't know anything about the meeting.

Q. No representative of your company was present? A. No, sir.

Q. Did you have any further discussions on this subject [1201] with the Flintkote people, that you recall?

A. Well, from time to time I would say that I thought they had a vacillating sales policy, usual needle.

Mr. Ackerson: I don't like to keep interrupting here.

Q. (By Mr. Black): I mean with relation to aabeta's activities. A. No, sir.

Q. You have told me everything you can recall of that particular subject relating to activities of the aabeta co.?

A. From time to time the aabeta co. was taking jobs in the Los Angeles area.

(Testimony of Gustav Krause.)

Q. I am talking about conversations you had with the Flintkote people about the presence of aabeta co. in the Los Angeles area.

A. No, sir.

Q. You have told me everything you can recall?

A. Yes.

Q. You don't have any other recollection of any other meetings or discussions or conferences?

A. I don't recall any.

Q. Did you at any time during this period have anything to do with any arrangements between the acoustical tile contractors on the subject of trading jobs——

A. No, sir.

Q. ——particularly public jobs? [1202]

A. No, sir.

Q. Or the matter of agreement to fix prices?

A. No.

Q. Did you ever tell any of the Flintkote people that such an arrangement existed in this area?

A. No, sir.

Mr. Black: You may cross-examine.

The Court: Further trial of this case is continued until Monday at 10:30.

(Whereupon, at 4:10 o'clock p.m., Friday, May 20, 1955, an adjournment was taken to Monday, May 23, 1955, at 10:30 o'clock a.m.) [1203]

Monday, May 23, 1955—10:30 A.M.

The Court: The jury and alternates being present, you may proceed.

Mr. Black: Your Honor please, Mr. Ackerson has graciously consented I may call a short witness out of order. He has to be in Pomona this afternoon. His testimony will be very brief.

The Court: All right.

Mr. Black: Mr. Cannon, please.

The testimony, not the witness, will be short. That is what I meant.

The Court: Every lawyer says that.

ROGER W. CANNON

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

Your full name, sir?

The Witness: I am Roger W. Cannon.

Direct Examination

By Mr. Black:

Q. This is a large room, Mr. Cannon, and I ask you to please speak good and loud, so we can hear you.

What is your occupation, Mr. Cannon?

A. I am an engineer. [1205]

Q. For whom do you work?

A. I am employed by Jackson Brothers, contractors.

(Testimony of Roger W. Cannon.)

Q. How long have you been so employed?

A. Fourteen years.

Q. In that connection, do you have occasion to let subcontracts for acoustical tile work?

A. Yes, sir.

Q. Was that true in the period 1951 and prior thereto, and running continuously through 1952?

A. Yes, sir.

Q. Do you recall a series of acoustical tile contracts that were made with the R. W. Downer Company some time in the fall or early spring of '51—fall of '51 or early spring of '52?

A. Yes, sir.

Q. Did you personally deal with those subcontracts?

A. Yes, I did.

Q. What was the date of your negotiations or the letting of the bid on that, if you know?

A. August of 1951 or thereabouts.

Q. And speaking generally, without going into close detail, what was the nature of that work?

A. It was the letting of the installation of acoustical tile ceilings in various buildings we had under construction. [1206]

Q. And where in general were those buildings located?

A. In various locations, but principally Southern California and principally in Los Angeles County, although there were one or two jobs in other locations.

Q. Who was the successful bidder on that job?

A. On the particular jobs that I believe you are referring to it was the R. W. Downer Company.

(Testimony of Roger W. Cannon.)

Q. With whom did you deal as a representative of the R. W. Downer Company, Mr. Cannon?

A. I dealt with a Mr. Lysfjord principally.

Q. And do you recall the circumstances under which that contract was made?

A. Well, they were the low bidders.

Q. And was there any particular things you remember about their being the low bidders?

A. Well, we had quite a few jobs which involved acoustic ceilings to be awarded approximately the same time, and we found that it was advantageous to award them as a group and take advantage of a discount in price because of our grouping them together and letting them to one contractor.

Q. What do you refer to when you say a discount in price?

A. Downer Company offered a 5 per cent discount from their quoted price if they were awarded two or more of the jobs at that particular time. [1207]

Q. And that was August, '51?

A. Yes, sir.

Q. When did the installation actually take place, if you know?

A. Well, subsequent thereto, a matter of a few months subsequent thereto. I don't have the exact dates.

Q. Did you know Mr. Lysfjord at that time, Mr. Cannon?

A. I knew him as a representative of R. W. Downer Company, yes.

(Testimony of Roger W. Cannon.)

Q. Did you have any close contact or personal relation or business relation with Mr. Lysfjord?

A. Only in respect as he represented Downer Company.

Q. Was that the first series of contracts the Downer Company had ever had from your organization?

A. The Downer Company had done work for us prior to that time.

Q. Over how long a period, if you know?

A. Well, I don't have any accurate information on that; I have personal recollection of doing business with Downer prior to my being with Jackson Brothers, and I think we also did business with Downer Company back in the 1940s. I don't have exact information as to that.

Q. That is the Jackson Bros. Company, to the best of your recollection?

A. Yes, sir. [1208]

Q. What factors do you consider in awarding contracts for acoustical tile as a matter of your general business practice?

A. It is our policy to let our contracts to the lowest responsible bidder who can comply with the plans and specifications on which we are working. [1209]

Q. Does your company, as a matter of policy, give any preferential consideration to any particular contractor?

A. Not unless there is a particular reason for it.

Q. Did you have any particular reason for giving preferential treatment to Mr. Elmer Lysfjord?

(Testimony of Roger W. Cannon.)

A. Personally, no.

Mr. Black: That is all. You may cross-examine.

The Court: Before the cross-examination, Mr. Ackerson, we will take up briefly the Brown case, United States v. Richard Brown.

You may sit here or you may step down, Mr. Witness. It will take just a few moments.

(Other court matter.)

Mr. Ackerson: Take the stand again, Mr. Cannon.

Cross-Examination

By Mr. Ackerson:

Q. Mr. Cannon, I didn't get it quite clear when, prior to this August, 1951, dealings that you had with Mr. Lysfjord, the time prior to that that you had done business with the Downer Company. Did I understand you correctly when you said, from your recollection, it was, you thought you recalled, around 1940 Jackson Brothers had done business with the Downer Company?

A. Not in 1940. But in the late 1940's, to the best of my recollection; I am sure that during that time, at least [1210] they figured with us and quoted us on work.

Q. Yes.

A. Within their special line of activity.

Q. You have no distinct recollection, I take it, of any particular job being awarded to the Downer

(Testimony of Roger W. Cannon.)

Company for a number of years prior to this '51 date?

A. I do know that in 1950 they did some work for us. They did one or two or three jobs. I couldn't tell you the extent of them, accurately.

I do recall that they did some work for us in Oxnard, but I don't recall with whom of the Downer Company I dealt at that time.

Q. Yes.

A. I have no record as to who I dealt with with the Downer Company.

Q. I understand. I gather that your own associations, as well as Jackson Brothers, with Lysfjord were satisfactory, were they not?

A. I had very few dealings with him, other than the initial negotiations of our agreements.

Q. Yes. Do you know whether or not either of the Jackson Brothers had dealings with him along about that time, too? I mean dealt with him directly on occasions?

A. I wouldn't know that, unless it were just incidental to the completion of the work they had under contract with us. [1211]

Q. Well, you felt that as far as your dealings with Mr. Lysfjord went that he was an acceptable, presentable representative of Downer Company, a person you would do business with?

A. Yes, sir.

Q. And that he was qualified to discuss and bid these jobs?

A. I do not know what authority he had in making prices.

(Testimony of Roger W. Cannon.)

Q. No, but you found that the prices he submitted and the way he dealt with you was an acceptable way? A. Yes, sir.

Q. And a qualified way? A. Yes, sir.

Mr. Ackerson: That is all. Thank you.

Mr. Black: Thank you, Mr. Cannon.

The Court: May this witness be excused?

Mr. Ackerson: Yes.

The Court: He is excused from further attendance.

(Witness excused.)

Mr. Black: Mr. Krause, will you resume the stand for cross-examination? [1212]

GUSTAV KRAUSE

having been previously duly sworn, resumed the stand and testified further as follows:

The Clerk: You have already been sworn.

Mr. Ackerson: You were through with direct, I believe, Mr. Black?

Mr. Black: Yes, I was through with direct.

Cross-Examination

By Mr. Ackerson:

Q. While I think of it, Mr. Krause, when did Mr. Newport leave for Europe?

A. He left July of 1954, I believe.

Q. He has been there a long time, then, I take it?

A. Yes, sir. It is mainly a health reason he went back.

Q. I was just curious. The fact that he has been gone has been raised two or three times during the

(Testimony of Gustav Krause.)

trial, and I wanted to know when he went.

As I recall it, you said the first time you ever heard of the aabeta company was when a salesman of yours came in and notified you that they were bidding on a job with Contracting Engineers, is that correct?

A. I believe it was Contracting Engineers.

Q. And did you also state that Coast, your company, had done a lot of work on the specifications, and so forth, [1213] on that same job?

A. I didn't say that Coast had, but I stated that I felt that our people had worked on that job because it was a Flintkote specification.

Q. Did you feel that Coast should have gotten the job? A. Not necessarily.

Q. Now, as I recall your testimony, you stated that in your talks with Sidney Lewis and Baymiller and Heller that you expressed the idea that it was your understanding that Flintkote had agreed that there would only be three contractors in Southern California in the Flintkote line. Was that your understanding? A. That is correct, sir.

Q. And that didn't have reference to any particular area in Southern California, it was just the fact that you understood there would only be three contractors down here?

A. That is correct.

Q. And you made no specific objection as to San Bernardino or Los Angeles, it was a general objection that they put in a new contractor, was that right? A. That is correct, sir.

(Testimony of Gustav Krause.)

Q. Now, Mr. Krause, it is not clear in my mind whether you stated that Baymiller and Heller came to see you first or whether you saw them after you saw Ragland. Which was it, do you recall? [1214]

A. The record of the times, going back to 1950 or '51, is a difficult thing, remember, but I do know I saw both Mr. Baymiller and Mr. Heller at one time and I saw Mr. Ragland.

Q. At another time?

A. At another time. [1215]

Q. Well, it isn't important. Your first contact, I believe, was with Mr. Sidney Lewis?

A. That is correct.

Q. You stated, also, that Baymiller and Ragland came unannounced out to the Coast Company and found you and Mr. Newport there. Is that right?

A. That is correct, sir. I do recall that, because if they had been announced I would have made it a special point to be there.

When I walked back, here I saw the two of them talking with Mr. Newport. It was news to me.

Q. Do you think if they had called for an appointment Mr. Newport would have had you there?

A. I am positive of that.

Mr. Black: What was the answer, Mr. Krause?

The Witness: I am positive of that.

Q. (By Mr. Ackerson): You pointed to an illustrative story concerning your objections. I believe you said, by way of illustration, that if you had spent a number of years building up a Ford agency

(Testimony of Gustav Krause.)

and then they let another agency across the street, why, you would be mad.

But isn't it a better parallel, Mr. Krause, that if you had a Ford agency and started selling Buicks in the same agency, that Ford would get mad, wouldn't they?

A. Well, if you want to put it that way, Mr. Ackerson. [1216]

Q. Isn't that practically what you were doing, you were selling Simpson, a competitive tile, in the same house with Flintkote tile? That was the case at that time?

A. At that time, Mr. Ackerson, and for the record of the Court I think there should be a definite reason for that—it should be brought out.

The Simpson acoustical tile line at that time was not a complete line. At that time we needed Flintkote tile to fill out our line and make it a complete line.

Q. But they did have duplicating basic board, 12x12 1/2-inch and 12x12 3/4-inch, the basic items they duplicated, didn't they?

A. That is correct.

Q. Did Flintkote have a complete line at that time?

A. No, sir, they did not. And another reason, we had strike situations going on at that time where two lines were absolutely necessary.

Q. Well, you have continued to maintain the two lines, haven't you?

A. With the permission of both manufacturers.

(Testimony of Gustav Krause.)

Q. Yes. And by agreement with both manufacturers? A. Correct, sir.

Q. Now, you stated that when Baymiller and Heller came in to see you two people, that is, you and Mr. Newport, they were very incensed. How did they express this anger? [1217]

A. Well, Mr. Baymiller is quite a bombastic individual. He was incensed over the fact acoustical contractors or customers of The Flintkote Company should tell The Flintkote Company how to run their business.

Q. Well, in a way that is what you were doing, wasn't it? A. Well, we were——

Q. You were telling them to cut off a supplier and you objected to their installing a supplier?

A. It wasn't so much we were telling them to cut off a supplier. It was the fact they had opened a new supplier without advising any of us in our firm.

Q. That was past. Your present objection was that the supplier was there, you stated, so you did make that objection, didn't you?

A. It was too late. We didn't tell them to cut off a supplier. We realized that they had opened up——

Q. When you called Mr. Sidney Lewis, didn't you tell him you wanted something done about it right now?

A. We didn't tell him we wanted something done about it right now. We just wanted to know why, what their new policy was.

(Testimony of Gustav Krause.)

Q. If Mr. Sidney Lewis testified you were very emphatic and you wanted some steps taken right now, immediately if not sooner, would you say he was wrong? [1218]

A. I couldn't say.

Q. It is hard to remember. You were mad at the time, any way, weren't you?

A. Yes, I was angry.

Q. Now, just what, if you can remember, what was the substance of Mr. Baymiller's expression of anger at the time he came in there and you questioned his, or objected to Flintkote establishing this new customer? What did he say?

A. Well, as I recall, he stated that they felt they needed another distributor in the San Bernardino-Orange County area to call on the malt shops, which was a cold turkey type of acoustical selling.

He stated that we weren't covering that area. All we were doing in that area was bidding. [1219]

Q. And that these clients had agreed to cover it?

A. That they had agreed to cover the area.

Q. What did you say?

A. That particular area.

Q. What did you say to him?

A. We had to admit that we were——

Q. Not covering it?

A. ——not covering the area.

Q. Did you tell them that you would cover it in the future?

A. I don't recall what we said as to what we

(Testimony of Gustav Krause.)

would or what we would not do, but we definitely stated we would make a further effort to cover the area.

Q. And how long did this conference last, Mr. Krause, with Mr. Baymiller and Heller?

A. I don't recall.

Q. Half an hour, maybe an hour?

A. Possibly.

Q. And it was on a pretty heated tone throughout, wasn't it?

A. Well, not on my part so much because I had realized that the act was done and there was nothing we could do about it.

Q. But they did do something about it later, didn't they? You are aware they did terminate these clients at a [1220] later date?

A. I was aware of it, yes.

Q. How long after or before, whichever it was, how much time intervened between your meeting with Baymiller and Heller and your meeting with Ragland, a week or two, a few days or what?

A. I don't recall.

Q. It was right about the same period?

A. It was right about the same time.

Q. Now did Ragland come out and see you and Mr. Newport or just you?

A. Well, he came out to see me.

Q. Mr. Newport wasn't there at that time?

A. Well, Mr. Newport spent only a portion of his time with the company.

Q. At that time?

(Testimony of Gustav Krause.)

A. He was a very sick man. He was suffering from something.

Q. You were more or less the active head of the organization at that time, weren't you?

A. In a sense, yes.

Q. I mean management sense, as far as the production end.

A. As far as the production end, not the financial end of the company. [1221]

Q. Yes, I am talking only of management. I don't mean to imply that you owned a half of it or that you owned any of it.

A. That is correct.

Q. Did Mr. Baymiller and Mr. Heller tell you they were going to do anything when they left that day?

A. No, sir.

Q. Let's get to the Ragland meeting with you. When he came out to the Coast Company to see you, either a few days before or a few days afterwards, what did Mr. Ragland have to say? Let's take yours first. What did you tell Ragland? Much the same thing as you told Baymiller?

A. Well, with Ragland and myself it was more of a personal thing. We were paratroopers together, and I said, "Bob, it has always been our understanding that there would only be three acoustical tile contractors appointed by the Flintkote Company as far as the Southern California area is concerned, why did you have to go ahead and appoint another one?" I said, "The least you could have done if you had decided to do it is to have told us

(Testimony of Gustav Krause.)

ahead of time that that was going to be the Flintkote policy.”

Q. What did Bob say?

A. It was along that basis.

Q. And Bob just said they promised to cover Riverside for us too and that was our reason? [1222]

A. He said that he really had nothing to do with it, that it was a decision of Mr. Harkins' as to whether or not there would be another acoustical contractor.

Q. Did you tell Bob, that is, Mr. Ragland, that you would see what you could do about covering that Riverside-San Bernardino area in the future?

A. Well, we might have but I don't recall that particular conversation, Mr. Ackerson.

Q. Do you recall in any conversation with the Flintkote people, either Lewis, Harkins, Ragland, Baymiller, Heller, Thompson, any of them, of promising to give Flintkote a better break, that is, buy more Flintkote tile in the future? A. No, sir.

The Court: Before we have another question, Mr. Ackerson, Judge Hall has just come in to see me on what he said is an emergency, so we will have to stand in recess for a few minutes.

(Short recess.) [1223]

Q. (By Mr. Ackerson): At the time you met Mr. Baymiller and Mr. Heller at your offices, Mr. Krause, you were aware, were you not, they were going to see Mr. Howard and Mr. Hoppe, too,

(Testimony of Gustav Krause.)

weren't you? A. No, sir.

Q. Weren't you aware of that?

A. No, sir.

Q. You didn't know they left your office and went over to see those two? A. No, sir.

Q. Didn't you a little later on call Mr. Waldron's home concerning this matter of aabeta's doing business? Didn't you discuss your contacts with Flintkote with Mr. Waldron a little later, Mr. Krause, over the phone?

A. I don't recall.

Q. Let me see if I can refresh your recollection.

After aabeta co. was cut off—if we can use that term—didn't you make a couple of attempts to get in touch with Mr. Waldron at his home? I mean over the telephone at his home, and talked with Mrs. Waldron once or twice? A. I don't—

Q. I don't mean talked with her. She told you he wasn't there and you called a couple of times before you got him, do you recall that? [1224]

A. The only contacts I recall having with Mr. Waldron were when he came to our office on one or two occasions, and when he did come to my office just recently, six months ago.

Q. I mean just shortly after these conferences you had with Flintkote, isn't it a fact you did get Mr. Waldron on the phone at his home and tell him you were sorry you had to do this to him, or something to that effect, that you didn't want him to—you didn't want him to dislike you personally for something you had to do in a business way?

(Testimony of Gustav Krause.)

A. I don't recall talking to Mr. Waldron. If I said that I must have had holes in my head, because I certainly wouldn't have said that.

Q. You did feel bad about what had happened to an old friend?

A. I don't know whether he was an old friend or not. He was a friend.

Q. You say you don't recall calling him on the phone? A. No, sir, I don't recall it.

Q. You just don't recall it?

A. I don't recall it.

Q. You say you don't recall calling him on the phone calls to the home before you finally got him? You don't—

A. There are so many things that happened during that period that it is difficult to remember, let me say that to you, Mr. Ackerson. It could be possible, but I am sure I didn't.

Mr. Ackerson: That is all, Mr. Krause.

(Witness excused.) [1225]

Mr. Black: I will call Mr. Howard.

RICHARD E. HOWARD

recalled as a witness by and on behalf of the defendant, having been previously duly sworn, resumed the stand and testified as follows:

The Clerk: Did we swear you once before?

The Witness: Yes.

Direct Examination

By Mr. Black:

Q. What is your occupation, Mr. Howard?

A. Acoustical contractor.

Q. With what company are you?

A. R. E. Howard Company.

Q. How long have you been in that connection?

A. Since 1943.

Q. Continuously? A. Yes.

Q. Are you the proprietor of that company?

A. Not solely, no.

Q. What position do you occupy with relation to it? A. Vice president.

Q. And were you its vice president in the summer of '51 and the spring of '52?

A. No, I was secretary-treasurer.

Q. What was the first occasion that you had any [1226] knowledge or information with respect to the operations of the aabeta company in the acoustical tile field?

A. I can't recall whether I was told that by one of the salesmen, our own salesman that heard someone else tell them, or whether I was told by the

(Testimony of Richard E. Howard.)

Flintkote people themselves or who. It is just very vague.

Q. Did you make any inquiry of the Flintkote people yourself with respect to aabeta company's operations? A. Yes.

Q. When did you do that if you can place the time approximately?

A. Shortly after I heard that they were operating in the Los Angeles area.

Q. Whom did you call in the Flintkote Company? A. I believe Mr. Baymiller.

Q. And would you relate that conversation as best you can, the substance of it?

A. Well, I called to inquire if they were operating in this area and just to relate that the understanding was that I had that they were supposed to have operated in the San Bernardino and Riverside area.

Q. Who said that?

A. I don't know. You mean where did I get the understanding?

Q. Yes. [1227]

A. That was several months prior or, I would say, even a year prior to this time. That was just an understanding that there were to be three contractors in this area handling the Pioneer-Flintkote line.

Q. I think you misunderstood me. You said something about this conversation and the plaintiffs being restricted to the San Bernardino-Riverside area. Who said that?

(Testimony of Richard E. Howard.)

A. Some of the Pioneer-Flintkote people, either Mr. Heller or Mr. Baymiller.

Q. You don't recall whether that was said on the telephone call?

A. Oh, no. I had heard prior to finding out that they were operating the Los Angeles area that they were operating up in the San Bernardino area.

Q. Did you have any further contacts about that time with the Flintkote representatives?

A. You mean after my hearing of them operating in the Los Angeles area?

Q. After you first talked to Mr. Baymiller as you have described.

A. Yes. I met Mr. Baymiller and Mr. Heller in Sound Control's office with Mr. Hoppe.

Q. How did you happen to be in Mr. Hoppe's office?

A. That I don't remember, whether I was asked to be there or whether I just happened by. [1228]

Q. What was said on that occasion by you, Mr. Hoppe, Mr. Baymiller and Mr. Heller, if you remember?

A. Very little, so far as I am concerned. I had very little to say. I was more or less listening to what the other people were saying.

Q. What do you recall as to what the other people said?

A. That the question—it was mostly a question, were they supposed to operate in this area or were they supposed to stay up in San Bernardino and Riverside Counties.

(Testimony of Richard E. Howard.)

Q. What specifically that you now recall did Mr. Baymiller or Mr. Heller say?

A. Neither one of them would say a great deal, because they said at that time they couldn't make any decisions. They would have to go through their office, someone that could make a decision, and find out if anything was going to be done about it.

They, too, were under the impression they weren't supposed to operate in this area, or in the Los Angeles area.

Q. Did you attend any general meeting of the acoustical tile contractors handling Flintkote products about this time, with reference to the aabeta co.?

A. Nothing.

Q. Did you ever hear of any such meeting?

A. No.

Q. Did you on that occasion or any other occasion tell [1229] any other Flintkote representatives that you would cut off your business with them if they didn't terminate the plaintiffs?

A. No, sir.

Q. Did you ever hear of any of the other Flintkote tile contractors making a similar statement?

A. No, I didn't.

Q. Were you or your company engaged at that time or immediately prior to or around that time in any plan for allocating bids on public jobs?

A. No.

Q. Or for fixing prices in that connection?

A. No, sir.

Q. Did you ever tell any of the Flintkote rep-

(Testimony of Richard E. Howard.)

representatives that such a plan had been or was in operation? A. No, sir.

Mr. Black: You may cross-examine.

Cross-Examination

By Mr. Ackerson:

Q. Mr. Howard, prior to this conversation with Baymiller, the first one, was that the first time you contacted Flintkote with respect to aabeta's being in business?

A. Yes; over the telephone I had called Mr. Baymiller or Mr. Heller; I can't recall which one, but I believe it was Baymiller. [1230]

Q. Didn't you also go down to the Flintkote offices?

A. I have never been in their offices.

Q. For that purpose.

Mr. Black: Would you repeat the answer, please?

(The answer was read.)

Q. (By Mr. Ackerson): You have never been in Ragland's, Baymiller's, Thompson's office——

A. I have never been in the Pioneer-Flintkote office.

Q. So it was by telephone? A. Yes.

Q. You talked with Baymiller, you say?

A. I believe.

Q. What did you tell him?

A. I didn't tell him. I asked him—or I told him that I heard—I will put it that way. I heard the

(Testimony of Richard E. Howard.)

aabeta co. was operating in Los Angeles and asked him if that was the policy. That I had understood they were to operate in the other area, Riverside and San Bernardino.

Q. Well now, I don't have it straight in my mind, Mr. Howard, where you got the idea originally they were to operate in San Bernardino.

Obviously, it was before you called Baymiller. Where did you get that idea?

A. I don't recall. It was an understanding that I had gotten through someone in the Pioneer-Flintkote Company, whom I don't remember; at that time it wasn't that important. [1231]

Q. You just have no recollection on that aside from the fact that you did have an understanding to that effect?

A. That is right. We weren't working in the area and I wasn't concerned with it.

Q. Well, you are not restricted to any territory, are you? A. No.

Q. You could work anywhere?

A. Anywhere. But we just weren't working the area.

Q. And I think you know that that is true, or that that was true at that time, with both Sound Control and Coast?

A. No, I didn't have much—well, I didn't know where they were working or where they weren't.

Q. No, but that they had the right to work anywhere? A. Yes, as far as I know.

(Testimony of Richard E. Howard.)

Q. Now are you sure that someone from Coast, Sound Control, Downer or someone like that, didn't call you up about these people being in business? Could that have been where you got your information? A. It may have been.

Q. It could have been?

A. It could have been.

Q. It could have been Mr. Arnett down at Downer's who was the former—— [1232]

A. No, not likely.

Q. But it could have been?

A. Oh, it may or could have been, yes.

Q. It could have been any acoustical tile contractor? A. That is right.

Q. Now where did you get your understanding that there was an agreement or an understanding that Flintkote would only have three acoustical tile outlets in this area? Who gave you that understanding? A. I believe Mr. Baymiller.

Q. When was that? When did he tell you that?

A. Shortly after we took the line, and I believe that was in either '49 or '50. At the time that we took on the Pioneer-Flintkote line there was only one other contractor at that time handling it.

Q. Who was that, Coast?

A. Degan & Brody.

Q. They are no longer in business?

A. No.

Q. Did Mr. Baymiller come to you to get you to take on the line or did you go to him to request it?

A. No, he came to us.

(Testimony of Richard E. Howard.)

Q. And you think that is where you got your understanding about limiting the contracts in Southern California to three? [1233]

A. Yes. It was discussed this way because they wanted to put the line out to three different contractors, those who already had another manufacturer's line, that would complete their acoustical line because they were limited just having started in manufacturing.

We had U. S. Gypsum Company which in itself wasn't a complete line, but the two companies rounded it out very well.

Q. Well, at that time U. S. Gypsum manufactured 12 x 12 one-half inch tile, didn't they?

A. That is right.

Q. And 12 x 12 three-quarter inch tile?

A. That is right, but not perforated.

Q. U. S. Gypsum's wasn't perforated at the time? A. No.

Q. Well, Flintkote sold the same sizes, did they not?

A. They sold other sizes as well, 24 x 24.

Q. So that you did have two overlapping lines, though? A. No.

Q. Insofar as those sizes went?

A. No. Sizes wouldn't meet the specification. It had to be perforated and had to be a certain type.

Q. When did U. S. Gypsum start perforating, the following year?

A. No, I think about three years ago '52. I am not [1234] to sure. I don't remember.

(Testimony of Richard E. Howard.)

Q. Did they sell perforated tile in '51 and the first part of '52?

A. It could be. I don't remember. Still they don't have the types that Pioneer-Flintkote makes.

Q. You have, I take it, on occasion sold acoustical jobs outside of this immediate Los Angeles area, haven't you, Mr. Howard?

A. Oh, yes.

Q. And in 1951 and '52 I believe you said you were secretary of the Howard Company. You were also the active manager of the company, weren't you?

A. That is right.

Q. You were the working manager—well, active is good enough.

A. All right.

Q. That was your principal duty, and you did head that department up of the company, didn't you?

A. That is right.

Q. Now how long did this meeting with Mr. Heller and Mr. Baymiller last over at Mr. Hoppe's office?

A. I don't believe it was more than a half an hour.

Q. You have heard this testimony about Mr. Baymiller being rather incensed at the Coast office. Was he incensed when he came over to your office? [1235]

A. No, very quiet and calm. There was no excitement at all.

Q. And he didn't commit himself on whether they should be in San Bernardino or whether Flint-

(Testimony of Richard E. Howard.)

kote would restrict them there or what Flintkote would do, did he?

A. That is right. As I recall, he said he didn't know much about it, couldn't make any decisions.

Q. Though he expressed that he didn't know where they were to be or what they would do about it?

A. That is right.

Q. Now did you also see Mr. Ragland on this same subject matter?

A. No.

Q. Did he call you on the phone about it?

A. No, I don't believe I met Mr. Ragland until after that time.

Q. So you have no recollection——

A. None at all.

Q. ——of him getting in touch with you about the aabeta business at all?

A. None.

Q. And if Mr. Ragland testified that way you would say he was wrong?

A. Will you repeat that again?

Q. If Mr. Ragland said he did contact you in connection [1236] with this aabeta company matter, then you would say that his testimony was in error, wouldn't you?

A. I would say if he did discuss it with me that I couldn't remember it.

Q. Did you have any contacts with Mr. Thompson in this connection?

A. No.

Q. Did you have any contacts with Mr. Harkins in this connection?

A. No.

Q. Do you know Mr. Harkins?

A. I met him here Thursday or Friday.

(Testimony of Richard E. Howard.)

Q. Did you know Thompson?

A. I met him also for the first time here.

Q. You had known Baymiller prior to this meeting?

A. Oh, yes.

Q. And you had known Ragland prior to this meeting?

A. Yes.

Q. Are they the two you usually dealt with in connection with the Flintkote tile?

A. No, Mr. Baymiller and Mr. Heller.

Q. And Mr. Heller?

A. Yes.

Q. Did Mr. Heller have anything to say at all at this meeting? [1237]

A. I don't recall him saying anything. Mr. Baymiller has always been over him in authority and I think he left it more or less up to him.

Q. Seemed to always let him do the talking?

A. Yes.

Mr. Ackerson: That is all.

(Witness excused.) [1238]

Mr. Black: Again I am in the position of having arranged for a witness the first thing this afternoon, your Honor. I assumed that this would go somewhat longer than it did. It is my last witness and it will be very brief.

The Court: We are trying to get through this case. Ordinarily courts don't try jury cases on Monday, because we have so many short cause matters.

Isn't there something you can offer? I had

planned to sit until 12:30 and then recess this case until tomorrow afternoon.

Mr. Black: Oh. I just have this accounting data. Maybe we can introduce it by stipulation.

Mr. Ackerson: I haven't seen it. I haven't any idea what it is.

Mr. Black: I think we need his testimony. I will be glad to go over this material with you. We will see if we can get hold of Mr. Bradley. There is just this one witness we have remaining. I had assumed—I am sorry—

The Court: When we have to devote only a part of a day to a case, I like to at least use that part of the day for the case.

Mr. Ackerson: Your Honor's plan was to go to 12:30 and adjourn until tomorrow?

The Court: Yes.

Mr. Black: We will see if we can get the witness right [1239] away.

If the court please, I am sorry, I just misunderstood the schedule. I assumed we would go on in the afternoon session today.

The Court: Well, the court stated early in the trial cases of this nature are, with all respect to them, so dull that it is difficult to keep, or, for a jury to keep alert attention on them if we run more than half a day at a time.

Mr. Black: We could do this, if Mr. Ackerson will consent to it: We will rest subject to this one witness, strictly relating to the books and records of aabeta co., and you could proceed if you have any rebuttal.

Mr. Ackerson: I have about a half hour or hour's rebuttal. I am perfectly happy to do that.

Mr. Black: Let's do that. That will solve our problem.

Mr. Ackerson: Will you take the stand, Mr. Lysfjord?

ELMER LYSFJORD

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ackerson:

Q. Mr. Lysfjord, I don't believe you have been here part of every session, so there are a few questions I want to ask you. [1240]

Do you recall the contracts that you brought to that second meeting at the Manhattan Club?

Do you have them generally in mind, as to what they were and what they consisted of?

A. Yes.

Q. Mr. Baymiller testified that he glanced over them and about 50 per cent of them were decorative tile. What do you have to say about that?

A. I would say there wasn't even one that was decorative tile.

Q. What sort of jobs were they, Mr. Lysfjord?

A. They were market buildings and I recall the names of a good many of them.

Q. What were they?

A. Von's Markets, two or three of those. A

(Testimony of Elmer Lysfjord.)

Ralphs' Market. A gas company in Inglewood. All of these use an acoustical tile; they do not use decorative tile.

Q. So it is your statement there was little, if any, decorative tile in any of those contracts?

A. I would say there was none at all.

Q. Now, did you ever have a conversation with Mr. Ragland concerning Phoenix operation acoustical tile?

A. Not definitely that one particular area. At our first contacts he mentioned quite a few places that he knew for sure that we could get a line, and I told him at that time [1241] I wasn't interested in working anywhere except the Los Angeles area.

Q. Was that before Mr.—those early conversations—by that do you mean before Mr. Ragland became promotional manager of acoustical tile?

A. Oh, no, no, no.

Mr. Black: Just a moment. That isn't quite correct. I don't think there is any testimony that he was manager.

Mr. Ackerson: I am using the term loosely, let's let the record show. Promotional man, sales promotion man.

Q. (By Mr. Ackerson): Are those early conversations you are referring to concerning Phoenix and many other localities before or after that June date when he took on that job?

A. That would be rather difficult for me to say, as to if it were before or after he had a change in

(Testimony of Elmer Lysfjord.)

his position in the company, because I wasn't aware of the fact there was a change.

Q. You thought he had the same job all the time?

A. So far as I was concerned, he did.

Q. As nearly as you can tell us, just what was it he said and what was your reply with respect to these other areas?

A. Well, as I said, he mentioned several areas that were quite remote from this area and said they had no representation there and it would be a very easy matter for us to [1242] become distributors in these areas.

And I replied that I was not interested whatsoever in going in any other area than Los Angeles, because I had spent a considerable part of my life here making contacts and friends, and 90 per cent of the sales business is in contact.

Q. Did you ever promise Mr. Ragland that you would go down to Phoenix and look the place over?

A. I had no idea of going to Phoenix.

The Court: The question is, did you ever promise Mr. Ragland you would go?

The Witness: No, sir, I never did promise him.

Q. (By Mr. Ackerson): Did you ever go to Phoenix for that purpose?

A. I have never been in Phoenix.

Q. Did you ever tell Mr. Ragland that you had been to Phoenix but you were there on a Sunday and you couldn't find out much about the acoustical tile business on a Sunday?

A. No, sir, I never did. Besides, it would be

(Testimony of Elmer Lysfjord.)

rather difficult to get to Phoenix and back on a week end, wouldn't it?

Q. Did you ever make a statement at either of these Manhattan Club meetings or elsewhere to Baymiller, Ragland or Thompson, that you had certain closed jobs or closed contracts that nobody else could sell, and I think they said you mentioned Contracting Engineers as one, and one or two others? [1243]

A. In the contracting, subcontracting business there is no such thing as a closed contract. There are friends, acquaintances, the ability to be able to talk to these people on jobs prior to their letting of these jobs.

As far as you mentioned, the Contracting Engineers, I don't think you could have picked one contractor in the whole city that would be less inclined to be known as a closed contractor. They take the very lowest bids of all.

Incidentally, I have never ever done a job for the Contracting Engineers as the aabeta co.

Q. Did you make any statement to the effect that Jackson Brothers would only buy from you?

A. No, sir, I never told them they would buy from us only or from me. It was I had the ability to talk with these people, primarily Mr. Cannon, who was here before, and discussed and arranged for a group of jobs to be sold at one time.

Q. And you showed him such jobs, did you, or called their attention to this fact?

(Testimony of Elmer Lysfjord.)

A. Yes, sir, I showed them contracts for those jobs.

Q. Do you know whether or not, while you were with the Downer Company, anyone else representing the Downer Company sold Jackson Brothers, obtained jobs from Jackson Brothers for that company?

A. On the contrary, the salesmanger at the time of my first contract was very elated with the fact we were able [1244] to get a job from Jackson Brothers, because in the past, with the exception of many years previous to my coming there, they had never been able to get any work from the Jackson Brothers. [1245]

Q. Who was it, Arnett? A. Arnet.

Q. Mr. Lysfjord, tell the court and jury what, if anything, you had to do with this Owens Roofing job that you have heard testified about here.

A. Frankly I had practically nothing at all to do with it except for the fact that I was aware that they did it.

Q. Did you learn about that job by having happened to be in the Flintkote offices? Do you remember that?

A. No, sir. I was told by Mr. Waldron that he had been down talking with the Owens Roof people and that he had acquired the job. At no time have I ever been to the Owens Roofing Company. Frankly, I don't even know where it is, except that it is in Los Angeles.

Q. You never met either of the McClains, the

(Testimony of Elmer Lysfjord.)

father or son? A. No, sir.

Q. Did you ever have any conversation with Ragland about the Owens Roofing Company job?

A. No, sir.

Q. Were you down to the Flintkote Company at any time that Anderson, their roofing salesman, came in and is alleged to have told Ragland about the job?

A. No, sir. The only times that I have ever been to [1246] the Flintkote Company's offices has been related at this court hearing.

Q. Did you ever—this may sound like a silly question, but I nevertheless want to ask it—did you ever accompany Ragland and/or Anderson over to the Owens Roofing Company offices?

A. No, sir.

Q. Did you have anything to do with performing the job, installing the tile?

A. Nothing whatsoever.

Mr. Ackerson: You may cross-examine, Mr. Black.

Cross-Examination

By Mr. Black:

Q. Now in connection with the mention, Mr. Lysfjord, of these various distant points, Phoenix, Albuquerque, Denver, and so forth, that you state Mr. Ragland brought up, wasn't the reason he brought it up because he told you that the Los Angeles area was not open but that these territories were? A. No, sir.

(Testimony of Elmer Lysfjord.)

Q. What was the occasion of his mentioning these distant points, if you know?

A. Well, he said that he was sure that without any trouble whatsoever that he could get me a distributorship in these several areas that have been mentioned, and that was [1247] at the outset of the conversation, and I told him that I was absolutely not interested whatsoever in going anywhere but in Los Angeles area, that I have chosen this place to be where I am going to live, and I have no intentions of going anywhere else.

Q. And you are prepared to state positively, Mr. Lysfjord that Mr. Ragland did not tell you that Los Angeles was not open but that these distant places were? A. Yes, sir.

Q. Now in connection with the matter of this Owens Roofing job, do you know whether Mr. Waldron did any of the installation work himself on that job?

A. I am quite sure that he told me he did.

Q. That he did? A. That he did.

Q. But you didn't help him on it?

A. No, sir.

Q. Do you know who did assist him, if anybody?

A. I believe it was Mr. Yoemans. However, I can't say positively.

Q. Well, Mr. Yoemans was not an ordinary crew man, was he? Did he normally do that work for you?

A. He is the first man that we ever had working

(Testimony of Elmer Lysfjord.)

for us. I am speaking now as the aabeta company, I owning it.

Q. Did he do the installing work or did you have a [1248] regular labor crew that did it?

A. What time are you referring to?

Q. When you first started.

A. At the time that I joined the company?

Q. Yes.

A. Yes, sir, he did the installation and also the truck driving.

Q. And did you and Mr. Waldron occasionally do installing work yourself? A. Occasionally.

Q. But it was Mr. Waldron rather than yourself that did it on the Owens Roof job?

A. That is true.

Q. Do you know a Mr. Scharf in the Contracting Engineers?

A. I am acquainted with him.

Q. Didn't you tell Mr. Ragland at the aabeta company office when he came down to find out—no, I don't believe. You deny that such a meeting existed, don't you? A. What meeting?

Q. You deny that there was a meeting at which Mr. Ragland came down to the Atlantic Boulevard address to tell you that you weren't supposed to be operating in that area?

A. I never said that ever.

Q. That is what I say, you deny that there was such [1249] a meeting?

A. I never denied that he ever came down and talked to me.

(Testimony of Elmer Lysfjord.)

Q. I mean for the purpose of telling you that you weren't supposed to be in the Los Angeles area.

Mr. Ackerson: Will you ask him the direct question?

Q. (By Mr. Black): I will put it this way: Do you recall a meeting at which Mr. Ragland came down to the Bell office and announced that you weren't supposed to be in the Los Angeles area?

A. Yes, sir, I deny that very vehemently.

Q. You deny that such a meeting took place?

A. Right.

Q. Do you remember discussing Mr. Scharf or the Wagner Brothers Construction Company jobs with Mr. Ragland?

A. There was some conversation to the effect that, were we bidding in the Los Angeles area, and I replied very readily we were, as I saw no reason why we shouldn't be.

Q. Was that before the termination meeting?

A. That was before the termination meeting.

Q. When did that happen, Mr. Lysfjord?

A. Oh, a matter of weeks, perhaps a month before we were terminated.

Q. And Mr. Ragland then did come down to find out [1250] whether you were bidding in the Los Angeles area apparently, did he?

A. Well, he came down to the office. What his purpose was I don't know.

Q. That was the subject of what he had to say, wasn't it?

(Testimony of Elmer Lysfjord.)

A. Well, he asked if we were bidding on certain jobs, and I answered yes.

Q. And those certain jobs were the Wagner Construction Company job, were they?

A. Possibly.

Q. Did he also mention the job for Contracting Engineers, or did you?

A. It is very difficult for me to remember individual jobs.

Q. You were in fact bidding on a job at that time for Contracting Engineers, weren't you?

A. We bid many jobs with Contracting Engineers.

Q. Well, now, what again do you recall that Mr. Ragland said on that occasion with respect to whether you were bidding jobs in the Los Angeles area or not?

A. He asked the very direct question whether we were bidding on several jobs that he mentioned, and I answered yes, we were.

Q. And what did you say to that? [1251]

A. I just answered it. I said we were.

Q. And what did he say in reply to that?

A. I don't think he mentioned anything at all. He asked a direct question and I answered it.

Q. He didn't say anything at all at that meeting about the fact that you weren't supposed to be in the Los Angeles area?

A. He has never ever made a statement to me of not doing work in the Los Angeles area, with the

(Testimony of Elmer Lysfjord.)

exception of the termination meeting, where he didn't speak at all.

Q. And how long did he stay at that meeting when he asked you about bidding in the Los Angeles area? A. I have no idea.

Q. Who else was present?

A. I don't recall.

Q. Was Mr. Waldron there if you can think back on it? A. Possibly he was.

Q. What did he say, if you remember, on that occasion?

A. I don't even remember if he was there or not.

Q. How long did this meeting last?

A. I have no idea. Quite often we went down to the corner for coffee. It could have been anywhere from half an hour to an hour and a half. He at times previous to that and possibly after that came by quite often for morning coffee with me. [1252]

Q. But you don't recall positively whether Mr. Waldron was or was not there at that meeting?

A. No, sir, I don't recall.

Q. You don't have any particular close relations with the Waggoner Construction Company?

A. No, sir.

Q. Did you tell Mr. Ragland you had?

A. No.

Mr. Black: I think that is all.

Mr. Ackerson: I have a couple of other questions.

(Testimony of Elmer Lysfjord.)

Redirect Examination

By Mr. Ackerson:

Q. Mr. Lysfjord, subsequent to your meeting with Mr. Harkins at the time you were told that you could be a Flintkote dealer, how many times would you say you had seen Ragland at the Bell Avenue address of aabeta co.?

A. Easily a dozen times.

Q. Could it have been more?

A. Possibly; quite possibly.

Q. Have you ever seen him at that plant, that address, subsequent to the termination meeting?

A. Any number of times.

Q. Has he been out there since then?

A. No, sir.

Q. You misunderstood my question. The question was, [1253] has he been out to the plant since the termination meeting?

A. Since the termination meeting?

Q. Yes.

A. I don't believe I have ever spoken to Mr. Ragland since the termination.

Q. So that all these meetings were prior to the termination meeting? A. Yes, sir.

Mr. Ackerson: That is all.

(Testimony of Elmer Lysfjord.)

Recross-Examination

By Mr. Black:

Q. Just one question. You had nothing to do personally with Mr. Ragland with respect to filling orders, contracts that you had let?

A. I don't understand the question.

Q. The time subsequent to the termination meeting, you bought about a third of a car of tile, I think it was, or maybe a half a car of tile from Flintkote.

A. We bought a carload and——

Q. I say subsequent to the termination meeting. You had purchased the first car prior to that time, had you not? A. Yes, sir.

Q. Subsequent to the termination you bought an additional quantity of tile from Flintkote?

A. Yes. [1254]

Q. Didn't you have any contact with Mr. Ragland in connection with that operation?

A. I saw Mr. Baymiller, in company with Mr. Waldron, at their offices. If Mr. Ragland was present I don't recall it at this time. It is quite possible he was, but there was no conversation between he and I, I remember.

Q. You don't recall any contacts with Mr. Ragland with respect to possible other sources from which you could get tile?

A. No, I—rather, Mr. Baymiller contacted me. Mr. Ragland may have given me a phone call or something like that.

(Testimony of Elmer Lysfjord.)

Q. You don't recall any personal meetings with him? A. No.

Mr. Black: That is all.

(Witness excused.)

Mr. Ackerson: I will call Mr. Waldron.

Your accountant is not here?

Mr. Black: Well, I don't believe—I understood that he was coming this afternoon, but apparently there is no afternoon session, and I don't think we can get him until the noon hour.

Mr. Ackerson: Very well. We will take up part of the time here.

Will you take the stand, please, Mr. [1255] Waldron?

WALTER R. WALDRON

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Ackerson:

Q. Mr. Waldron, did you examine any of the contracts in this portfolio of contracts brought to the second meeting at the Manhattan Club?

A. I believe I did. I believe I checked perhaps quantity against cost, as a normal routine.

Q. Were there any of your own contracts in that portfolio or were they all Lysfjord's?

A. No, I had some separate. I had a couple of

(Testimony of Walter R. Waldron.)

jobs with me. I think one was—I don't remember what they were now; some market jobs, I guess.

Q. Do you recall whether or not those jobs that you now refer to had anything other than acoustical tile in them?

A. I don't believe so; at least, mine didn't.

Q. Did Mr. Ragland individually ever discuss the possibility with you of taking a Phoenix franchise or a Denver franchise, or something like that?

A. I don't believe so, Mr. Ackerson.

Q. Was such a subject brought up by any of these Flintkote people at any of your meetings at the Manhattan [1256] Club or the—

A. About outlying—out-of-state—is that what you are referring to?

Q. Yes. About taking their line some place else, in Denver, Nevada or Phoenix?

A. I think I heard—I don't know if I joined in on general conversation—that they hadn't set up anyone out of state to any degree, and would like to do that in due time, whenever they could find someone.

But I don't remember of it being put to me as a point of—to be considered by myself.

Q. In other words, it was just casual conversation?

A. Yes. I don't believe they had anyone at all in the out-of-state—or, at least, to speak of; the way they talked.

Q. With reference to these out-of-state points, did they have anything to do with the business at

(Testimony of Walter R. Waldron.)

hand of you and Lysfjord getting a line of acoustical tile, or was it just conversation?

Mr. Black: That is objected to as leading.

Mr. Ackerson: Well, I will strike "or was it conversation"—

Q. (By Mr. Ackerson): Did it have anything to do with the business at hand of you getting acoustical tile?

A. No, no. I am not too sure that was brought up at [1257] that meeting. I think it was just general conversation.

It might have been between Elmer and myself, that they needed someone out of state. But I don't—my recollection now is I don't believe it was a point of issue at that meeting.

Q. Did you ever seriously consider getting an acoustical tile line to be applied out of the state or setting up an out-of-state office, rather than Los Angeles? A. No, I didn't.

Q. Did you ever assert any interest to Ragland concerning setting up a business in Phoenix?

A. No.

Q. Did you ever discuss it with him?

A. I don't believe I ever discussed it at all in a serious nature. If I did, it was just conversation of how—where they planned to operate.

I don't remember they had started to explore those areas themselves at that time.

Q. Did you, Mr. Waldron, at any of these meetings at the Manhattan Club or any of the meetings

(Testimony of Walter R. Waldron.)

preceding your introduction to Harkins, ever discuss these closed contracts or closed situations?

A. With Mr. Harkins?

Q. Yes. Or with Baymiller, Ragland or Thompson. Did you ever tell them you had a closed account that nobody could [1258] get to?

A. No, I don't believe so. They may have used the word "acquaintances" or "people you had worked with for a number of years" and felt that was a meaning on our part. But that is impossible to do, because the general contractors, if they allow subcontractors to have the figure they want, I don't believe they would be in business very long.

Q. In your experience you have never had a general contractor that would give a job to you if your bid was high, in preference to someone else with a low bid, have you? A. No, I haven't.

Q. What about this Waggoner Construction Company that has been mentioned here, do you have a special "in" there?

A. I don't know that you would call it a special "in." I have never gotten a job there that was any more money in it than someone else wanted it for. And if my—I have lost jobs there because of that.

Q. Do you own any of that company, are you financially interested in Waggoner Construction Company. A. Oh, no.

Q. In other words, your only contact has been as a salesman of acoustical tile?

A. That is right.

Q. Now, Mr. Waldron, I would like you to recall

(Testimony of Walter R. Waldron.)

as nearly as possible just how, what you know about this Owens [1259] Roofing job, how it come to you, to your attention.

And then just proceed chronologically and tell us what happened. When did you first hear of the Owens Roofing job?

A. As I recall it, Bob told me about it, to go over there because he had mentioned to them that we were in the business and we would be happy to figure the work.

But I don't remember of Bob being there, as he mentioned, that he introduced one of us; he thought it was Elmer. I don't remember him being there in that office.

Q. Do you recall whether Ragland called you on the phone about the job?

A. I believe that was the way it was, because there was no other—unless he stopped by the house, or something of that nature, but I believe he called me on the phone. [1260]

Q. Then what did you do? Did you go see the McClains over there? A. Yes, I did.

Q. Who did you see? Was it the elder McClain or the younger McClain, if you know?

A. I saw the younger McClain. Jim they call him, I think.

Q. And what transpired? What did you say and what did he say and what was the result?

A. Well, I told him that we were the new representatives for the Flintkote people, and Bob asked me to stop by on this job, and he remembered—I

(Testimony of Walter R. Waldron.)

asked him if he know Bob Ragland. He said he did. I don't know how well. But anyway it tied the association together there. And he let me figure it then told me to go ahead and do the job.

Q. Without any bidding at all?

A. Well, I had a bid there. I don't believe he had another bid. I am not sure.

Q. Now did you put that job in yourself, by that I mean did you actually apply the tile?

A. Yes. My superintendent, or our first man with us, who turned into our superintendent, helped me.

Q. That was Mr. Yoemans? A. Yes.

Q. Do you recall when you did that job, you and [1261] Yoemans?

A. I think it was sometime in February or January of '52, but I can't remember the exact date. I think it is here. I believe I saw the old contract the other day but I have forgotten what the date was. It was right along in there.

Q. How long did it take you to put in the job?

A. I believe two days or three days.

Q. Did Mr. Lysfjord have anything to do with the job, I mean any personal contact with the job, to your knowledge?

A. No, he was busy at the time.

Q. He was still with Downer Company then?

A. I believe he was finishing up in clarification of jobs and work procedures or changes on jobs, if they wouldn't be understood by the new salesman, and that was why he was staying over.

(Testimony of Walter R. Waldron.)

Mr. Ackerson: Now, if your Honor please, I notice that we have some exhibits marked for identification. I think they have been identified thoroughly. I think it is proper rebuttal to put them in. They relate to Mr. Black's questions of each of these people, and I believe they should be introduced in evidence at this time as rebuttal testimony.

I am talking about the Downer exhibits, the Howard exhibits and those other take-off sheets. I would like to offer them at this time.

Mr. Black: Aren't they already in [1262] evidence?

The Clerk: They are in as 19 through 24, I believe.

(Conference between counsel and the clerk.)

Mr. Ackerson: My notes show that some of them are not in.

The Clerk: No. 30 I don't show in.

Mr. Black: That is the Armstrong file. I don't believe so.

Mr. Ackerson: I think I have sufficient of them in.

Mr. Black: Is No. 32 in?

The Clerk: No, sir, I don't show that.

Mr. Ackerson: What is that?

Mr. Black: That is Coast.

Mr. Ackerson: Is 35 in?

The Clerk: Yes, 33, 34 and 35. 32 is not.

Mr. Ackerson: Well, then, I will offer 32 at this time, Br. Black. I think the rest of them are in.

(Testimony of Walter R. Waldron.)

Mr. Black: Subject to the same formal objection, if the Court please, made to all of this testimony.

The Court: Received in evidence.

(The document referred to was received in evidence and marked Plaintiffs' Exhibit No. 32.)

Mr. Ackerson: Now, your Honor, I am ready for Mr. Black's witness. I don't want to close until I have heard him.

Mr. Black: I may have a spot or two of cross-examination. [1263]

Mr. Ackerson: Yes. Go ahead.

Cross-Examination

By Mr. Black:

Q. How early in the progress of these negotiations, Mr. Waldron, did you begin to have any extended discussions with Mr. Ragland?

A. Well, I think it would be somewhere in the fall of '51. There were several general conversations along those lines with him and Lysfjord prior to the time of my entering into it.

Q. I may be in error in this, but I had the impression that you hadn't made up your mind to go into partnership with Mr. Lysfjord until a fairly late date in this operation. Am I right on that?

A. I think that is correct.

Q. When was it that you finally decided to go into partnership?

A. I don't remember the exact date, but I know

(Testimony of Walter R. Waldron.)

we agreed if we could get a line then we would form a partnership, but I don't know exactly when that was. Did I state that before?

Q. No, I am not trying to contradict you, I am trying to clear up something in my own mind that I am a little uncertain about, just when in the scheme of things that it was [1264] your intention to go into this partnership business.

A. Probably somewhere in the fall or late fall or early winter of November, October or November, somewhere in there maybe.

Q. Are you able to state one way or the other whether it was before or after Mr. Lysfjord had his first meeting with the Flintkote people, which we refer to as the first Manhattan Supper Club meeting?

A. I think it was before that. However, as I remember, his first talking regarding the acoustical line was more or less for himself because he didn't know at the time that I might be interested, and I don't believe we got together on it until sometime in October and November for sure.

Q. You didn't have any really serious discussions then with Mr. Ragland before that date, did you?

A. Before which date?

Q. Before the date that you had pretty much made up your mind at least to take a chance at going into business with Mr. Lysfjord?

A. We discussed the possibility of going into business. However, we didn't want to go into it without being a competitive contractor and we made

(Testimony of Walter R. Waldron.)

comparisons of costs of materials from lumberyards as to what we were doing in the field at that time, and it didn't show a very good picture to start business with. That was early that year sometime. [1265]

Q. Early in '51?

A. Yes. We discussed it for some time.

Q. My question relates to your discussing the matter with Mr. Ragland. Did you start talking to him much before the time you started deciding pretty much definitely to go with Mr. Lysfjord?

A. Our conversations were that if we got a line we would form a company, a partnership, but how early that was I don't know. I think it could have been tentatively in our minds from the beginning.

Q. I am talking about you personally, not either of you, but I mean you personally.

A. Well, I can't fix a date, but I think it was probably September or somewhere in the early fall, as nearly as I can think of it at the moment.

Q. Were you at a meeting at the Bell office when Mr. Ragland asked whether you were bidding on jobs in the Los Angeles area?

A. Well, I don't see how that could have happened—I will answer your question, too, sir.

Q. Don't start speculating with me.

A. I am sorry.

Q. Will you try to answer my question? Do you recall any meeting at the Bell office at which Mr. Ragland specifically asked either your or Mr.

(Testimony of Walter R. Waldron.)

Lysfjord if it was true you were bidding jobs in the Los Angeles area?

A. Not to me. I was there at one of his meetings, too, Mr. Black, when he was telling about Mr. Krause being so angry.

Q. I don't mean—— A. But——

Q. Go ahead.

A. I believe you are thinking that that might be the time. But he was there prior to that on various occasions.

Q. On that or some other occasion, do you recall his [1267] asking about specific jobs, including the Waggoner Construction—what is that company? I can't remember at the moment.

A. Waggoner Construction Company.

Q. Waggoner Construction Company. Do you remember his asking about that?

A. I don't know if he asked about it specifically. I know I had it, and had he I could have showed it to him. He might have asked me, Mr. Black, but I wouldn't know. I wouldn't be able to tie it down, because, as I remember, there was nothing contrary to his being there, to our activities at that time. He came over to tell us about some promotion——

Mr. Black: That is all a conclusion of the witness, if the Court please. I am asking if he remembers a discussion.

I will ask that that part of the answer be stricken, "there is nothing contrary to our intention at the time" or what not.

The Court: Motion granted.

(Testimony of Walter R. Waldron.)

Q. (By Mr. Black): But you do remember there was some discussion between you and Mr. Ragland about the Waggoner job?

A. I don't recall it as being any particular job. I know that was one of the first jobs probably I got a contract on, of a good-sized job. I might have told him about it.

Q. You don't remember discussing that job specifically by name with Mr. Ragland? [1268]

A. I don't know, Mr. Black, I don't recall—I don't think so.

Q. You don't think so? A. No.

Q. You don't think Construction Engineering Company was mentioned?

A. What engineering company, sir?

Q. Construction Engineering Company. Is that the right name?

Mr. Doty: Contracting Engineers Company.

Q. (By Mr. Black): Contracting Engineers. I am having a terrible time getting these names straight.

Do you recall that being discussed, too, that company?

A. I don't know. That might have been at another time, Mr. Black, he was there, when I wasn't present.

Q. Your recollection on that is very indefinite, I take it?

A. Contracting Engineers, yes, because I rarely had been in their office. My acquaintance there was with just one person, Mr. Walter Levine.

(Testimony of Walter R. Waldron.)

Q. But you have had a lot of work or considerable work with the Waggoner people?

A. Waggoner, yes.

Q. That was one of the early jobs you did bid on as the aabeta co.? [1269]

A. Yes, I am sure it was.

Q. Where was that? A. The job?

Q. Where was the job?

A. That was the Van Nuys Hospital in Van Nuys; I think that was the name of the hospital.

Mr. Black: I think that is all.

Mr. Ackerson: I just want to ask one question, your Honor. I will make it one.

Redirect Examination

By Mr. Ackerson:

Q. Prior to this termination meeting, Mr. Waldron, did Mr. Ragland ever at any time state to you or make the statement in your presence that you were not supposed to be doing business in Los Angeles? A. No, sir.

Mr. Ackerson: That is all.

Mr. Black: That is all.

(Witness excused.)

The Court: This particular case is now adjourned until tomorrow at 1:30. The Court until 1:30 today.

(Whereupon, at 12:25 o'clock p.m., Monday, May 23, 1955, an adjournment was taken to Tuesday, May 24, 1955, at 1:30 o'clock [1270] p.m.)

May 24, 1955; 1:30 P.M.

The Court: Proceed.

Mr. Black: At this time, if the Court please, I am going to call Mr. Lewis first just to lay a foundation for certain documentary evidence.

Will you take the stand, Mr. Lewis?

SIDNEY M. LEWIS

recalled as a witness by and on behalf of the defendants, having been previously duly sworn, testified further as follows:

The Clerk: Did we swear you previously?

The Witness: Yes, I have been sworn.

Direct Examination

By Mr. Black:

Q. Mr. Lewis, are you familiar with the prices prevailing for Flintkote acoustical tile during the entire period commencing in 1951 and ending up to the present time? A. I am.

Q. Are you also familiar with the nature of the merchandise sold by other dealers in this area of products similar to those made by Flintkote?

A. I am quite familiar with them.

Q. Did you examine a series of invoices produced by the plaintiffs in this case in order to assist the accountant in [1272] preparing a tabulation of those invoices? A. I did.

Q. Will you state precisely what you did in that connection?

A. Well, there were a group of invoices which

(Testimony of Sidney M. Lewis.)

had been rendered to the plaintiffs by Harbor Plywood—do you want the names of the companies?—

Q. These are the invoices?

A. —and E. J. Stanton Lumber Company, in which there were a number of invoices rendered for materials.

I separated the invoices by dates and indicated on those invoices those items which were more or less and which we consider acoustical tile.

Q. And did you assist Mr. Bradley in determining the price to be charged by Flintkote for tile of that character?

A. I furnished copies of our price lists.

Q. To Mr. Bradley?

A. Which had been in effect during that time.

Q. And those price lists were correct?

A. Yes, sir.

Q. Are these the invoices that you examined—I show you Plaintiffs' Exhibit 40 for identification?

A. Shall I take them out?

Q. Just sufficient to identify them as the ones you examined. [1273]

A. (Examining exhibit): I saw those; yes, sir. Yes, I saw these.

Mr. Black: I think that is all.

Do you have any questions, Mr. Ackerson?

Mr. Ackerson: Just a couple.

(Testimony of Sidney M. Lewis.)

Cross-Examination

By Mr. Ackerson:

Q. Mr. Lewis, your testimony is based, then, upon your idea of the definition of acoustical tile, what you understand it to be?

A. What I understand it from my experience in the business, yes.

Q. In other words, what Flintkote purportedly——

A. And a knowledge of the business, yes.

Q. But you do admit, of course, that I am assuming that you are saying that acoustical tile is only tile that has holes punched in it?

A. Not necessarily.

Q. All right. I wanted to make that clear because I think you will admit that acoustical tile companies who probably didn't punch holes in it at one time or another still thought they were selling acoustical tile, didn't they?

A. Well, when non-perforated tile is sold, it is usually of a special low density nature, a special fiber.

Q. This is acoustical tile in the building, isn't it? [1274] It is at least considered so by the manufacturer?

A. That is not tile.

Q. On the walls?

A. That is acoustical plaster, I think.

Q. You have noticed the halls out here, haven't you?

(Testimony of Sidney M. Lewis.)

A. That is a special acoustical tile, yes, sir.

Q. That is considered acoustical tile?

A. Yes, that is true.

Q. You stated that you were acquainted with Flintkote's prices during these years?

A. Yes.

Q. Are you also acquainted with the other manufacturers' prices for the same 12 x 12 one-half inch tile?

A. We try to keep ourselves informed.

Q. You keep yourself informed?

A. That is right.

Q. They are by and large the same during those years?

A. To the best of my knowledge and belief. That is all.

Mr. Black: One more question, Mr. Lewis.

Redirect Examination

By Mr. Black:

Q. In the category of acoustical tile you included everything that was sold by Flintkote on a direct basis to acoustical tile contractors, did you [1275] not?

A. Well, in this group of invoices there were some materials sold by the Harbor Plywood Company which was a perforated material and which is in a borderline category, I would say.

Q. But you put that into the category——

A. Of acoustical tile.

Q. ——of acoustical tile? A. Yes, I did.

(Testimony of Sidney M. Lewis.)

Q. You did not exclude that?

A. I did not.

Q. Even though it is not an AMA tile?

A. That is right.

Q. And did you include in acoustical tile everything that Flintkote sold direct to acoustical tile contractors? A. That is correct.

Mr. Black: No further questions.

Recross-Examination

By Mr. Ackerson:

Q. Do you know, Mr. Lewis, whether or not—I am asking your personal knowledge in connection with this testimony you have stated—there was any understanding as to whether or not plaintiffs would be restricted to your definition of acoustical tile, decorative tile, or whether they could buy it from Flintkote? Do you know that?

A. We only sell the perforated acoustical tile which [1276] we classify as an acoustical material, and which is only sold to contractors of the type of the plaintiffs. The non-perforated tile, regular insulating tile, we don't sell to the contractor trade. We sell to dealers and distributors only.

Q. You never sell that direct? A. No, sir.

Q. On a contractor, say, like Coast Insulating, if they wanted to buy a carload of tile and they needed maybe a border tile to go around the edge of a ceiling, is it your statement that Flintkote

(Testimony of Sidney M. Lewis.)

would make them buy that small amount of tile from a lumber company or somebody?

A. Yes, that is true. We do make a border tile which is a non-perforated tile of the same fiber which could be used for borders if they wanted to purchase it.

Q. And you do sell that, you would include that in a carload of tile?

A. It is a border tile and used in those cases.

Q. And it is listed on your price sheets?

A. That is right.

Mr. Ackerson: That is all.

Mr. Black: Thank you. That is all.

(Witness excused.) [1277]

Mr. Black: Mr. Bradley, please.

LOUIE M. BRADLEY

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated, sir.

Your full name, sir?

The Witness: Louie M. Bradley.

Direct Examination

By Mr. Black:

Q. What is your occupation, Mr. Bradley?

A. I am a certified public accountant.

Q. With what firm?

A. Lybrand, Ross Brothers & Montgomery.

(Testimony of Louie M. Bradley.)

Q. In what capacity are you connected with that firm? A. I am a supervisor.

Q. How long have you been connected with them? A. Approximately 15 years.

Q. How long have you been a certified public accountant? A. Approximately six years.

Mr. Black: I will ask, Mr. Clerk, that this tabulation and the supporting sheets be clipped together and marked for identification as Defendant's Exhibit next in order.

The Clerk: Defendant's K for identification.

(The document referred to was marked Defendant's Exhibit K for identification.) [1278]

Mr. Black: Mr. Bradley, I show you a tabulation headed "aabeta co., Purchasers of Acoustical Tile," and I will ask you if you can identify that document.

The Witness: Yes, those were prepared by myself or under my supervision.

Q. (By Mr. Black): Will you state what you did in connection with your preparation of that tabulation?

A. From the invoices that were supplied by the aabeta co., which would be these (indicating) in front of me, and taking the descriptions that were given to me by Mr. Lewis, as those—distinction between those which would be acoustical tile and other types of tile and other types of material, we prepared a list by years of those materials that were acoustical tile and those purchases that were

(Testimony of Louie M. Bradley.)

other than acoustical tile for the years 1952, 1953, 1954 and a portion of 1955.

Q. And that list is shown on those supporting schedules, is it not?

A. Yes, with the entire description of the item, using the unit price, the total price of the invoices, and then we—from the Flintkote price schedules we also compared those with the Flintkote unit price and total price.

Q. Now, would you kindly refer to the summary page, the top page of this and state what that refers to?

A. This is a summary of all the sheets we [1279] prepared, breaking down the purchases of acoustical tile between years, showing the actual purchases as shown by the invoices, and what they would have amounted to on Flintkote prices, and then another column on purchases of materials other than acoustical tile.

Q. Would you state for each year the amount actually paid for acoustical tile and the amount that would have been paid for Flintkote tile of that same character?

A. Yes. In 1952, the actual purchases of acoustical tile amounted to \$11,654.35. At Flintkote prices, \$10,059.60.

For 1953, the actual purchases would have been—were \$31,499.57. At Flintkote prices, \$27,275.65.

1954, the actual purchases were \$21,000.01. Flintkote prices, \$17,954.68.

(Testimony of Louie M. Bradley.)

In 1955, or a portion of 1955, the actual purchases were \$2,603.02. Flintkote prices were \$2,226.20.

Q. Now, what were the total purchases of acoustical tile for the entire period?

A. Actual purchases were \$66,756.95.

Q. What was the excess price paid over the comparable price that would have been charged by Flintkote for the same commodity?

A. \$9,240.82.

Q. That is for the entire period?

A. That would be for the entire period. [1280]

Q. What is the total of items other than acoustical tile purchased during that period?

A. The total was \$20,635.00.

Q. Did you find in percentage the excess paid for the acoustical tile over the comparable price charged by Flintkote for the same material?

A. Yes.

Q. What was that percentage? A. 16.066.

Mr. Black: I shall offer this in evidence as Defendant's Exhibit K.

Mr. Ackerson: No objection, Mr. Black.

The Court: Received.

(The document heretofore marked Defendant's Exhibit K was received in evidence.)

Mr. Black: I will now ask the clerk, please, to mark this next schedule of three pages as Defendant's Exhibit L for identification.

(The document referred to was marked Defendant's Exhibit L for identification.)

(Testimony of Louie M. Bradley.)

Q. (By Mr. Black): I now show you another schedule captioned "aabeta co. Summary of Statements of Profit and Loss," and I will ask you to state what that document consists of.

Mr. Ackerson: What is that exhibit number?

Mr. Black: That is L for identification. [1281]

The Witness: This is a summary of the statement of profit and loss for the years 1952, 1953, and 1954.

It is a summary showing the total income, the cost of sales and the gross profit, operating expense and net profit for each year, each one of the years, 1952, 1953, and 1954.

The percentage that each one of those items bears to the income, which was at a hundred per cent.

Q. (By Mr. Black): From what information is that table compiled?

A. These were compiled directly from the books of the aabeta co.

Q. You didn't depend on any other information for that? A. No.

Q. Taken entirely from the books?

A. Yes, that is right.

Q. Is that right? A. Yes.

Mr. Black: I will ask this be offered in evidence as our Exhibit L.

Mr. Ackerson: No objection.

The Court: Received.

Mr. Ackerson: May I see that last document?

Mr. Black: Yes.

Mr. Ackerson: Are you through with it?

(Testimony of Louie M. Bradley.)

Mr. Black: Yes, through with that document.

I now ask this document be marked Defendant's Exhibit M for identification.

(The document referred to was marked Defendant's Exhibit M for identification.)

Mr. Black: I think you have seen this, Mr. Ackerson.

Mr. Ackerson: Yes. No objection to that, Mr. Black.

Q. (By Mr. Black): I now show you this document marked Exhibit M for identification, and ask you to identify that.

A. This is a listing of the purchases of acoustical tile from The Flintkote Company by the aabeta co.

Q. And upon what information is that table based?

A. From copies of the invoices from The Flintkote Company to the aabeta co.

Mr. Black: I will offer this in evidence as Exhibit M.

Mr. Ackerson: No objection.

The Court: Received.

(The document heretofore marked Defendant's Exhibit M was received in evidence.)

Mr. Black: You may cross-examine.

Mr. Ackerson: I wonder if you would mind passing this Exhibit M to the jury after I cross-examine.

Mr. Black: Yes. You want it held up?

(Testimony of Louie M. Bradley.)

Mr. Ackerson: No. I just don't anticipate a long cross-examination. [1283]

Cross-Examination

By Mr. Ackerson:

Q. Nice to see you again, Mr. Bradley.

A. Nice to see you, Mr. Ackerson.

Q. Mr. Bradley, when you purported to segregate this acoustical tile from other materials, you took Mr. Lewis' construction as to what acoustical tile was? A. I did.

Q. You are not an expert in acoustical tile, are you? A. No.

Q. So Mr. Lewis told you to segregate this type of material and limit acoustical tile to this type of material, is that right?

A. Each one of the invoices were marked for my guidance.

Q. He marked them? A. Yes.

Q. In other words, each invoice said, "This is not acoustical tile. This is acoustical tile," or something to that effect? A. In effect, yes.

Q. Yes. So that by and large if there were some border units on it, why, was that acoustical tile, do you know?

A. I don't believe I would be able to answer that question. [1284]

Q. In other words, you just took Mr. Lewis' notation and tabbed it up.

A. Yes, that is right. [1285]

(Testimony of Louie M. Bradley.)

Q. Now you came up, as I remember it, with a figure of 16 point something, the percentage that plaintiffs paid for tile over and above that which they would have paid to Flintkote, is that right?

A. Yes.

Q. Now in that connection, Mr. Bradley, what did you do, take each purchase of tile that the plaintiffs bought and then from that you took the price sheet of Flintkote and you computed what each purchase would have cost in each category?

A. That is right.

Q. Without regard to carload lots or less than carload lots?

A. The pricing—the Flintkote prices were based entirely on carload lots.

Q. That is what I wanted to find out. But you still came up with a figure of 16 per cent plus?

A. Yes, that is correct.

Q. Higher than they would have paid Flintkote?

A. Yes.

Q. I am going to hire you after this. We are one-tenth of a per cent off in our estimates.

Now on this Exhibit L, Mr. Bradley, you have a net profit figure here which varies. It says 1952 the net profit figure was 5 per cent, '53 it was 11 per cent and '54 it was 5 per cent, is that right? [1286]

A. Yes, that is the percentage on the income figure.

Q. On the income figure? A. Yes.

Q. Now do you know whether or not that profit

(Testimony of Louie M. Bradley.)

included—I mean before you arrived at that profit, was there a sales commission deducted?

A. From those figures I have there, I would have to look at the detailed profit and loss figures. Those are summary figures on this only.

Q. Then you can't tell from this exhibit whether or not this was really the total profit after labor and materials and overhead or whether it was net profit exclusive of a sales commission?

A. Well, it is the net profit as shown by the records of the aabeta company, and if those expenses of the aabeta company included the sales commissions, they would be in there.

Q. But you don't know if they are in there or not?

A. If I saw the detailed profit and loss statements I would be able to tell you, I believe.

Q. But you don't know whether that factor was taken into consideration here in this Exhibit L or whether it wasn't? You have to look at the books again. You can't state in your own mind now?

A. I do not recall exactly, that is correct. [1287]

Mr. Black: I think the 1952 figures may be there, Mr. Ackerson. You might ask him that.

The Witness: Was that one of those schedules that was included?

Mr. Black: I think so.

Mr. Ackerson: I don't know. I didn't mean to obscure anything. I just wanted to know.

The Witness: There is an item here in 1952 of

(Testimony of Louie M. Bradley.)

commissions, yes, in the amount of—well in excess of \$3,000 for the year 1952.

Q. (By Mr. Ackerson): Do you know what percentage that would be? Can you tell?

A. Based upon sales?

Q. Yes.

A. It would be approximately 3 per cent.

Q. What about the next year, '53, is there anything for '53 or '54 along that line?

A. The reason we have a detail for 1952 was that I believe the records that were submitted included an income tax return that showed the detail of the profit and loss statement.

In 1952 there was none included so we prepared our own from the records.

Q. What do you have on that line that says whether or [1288] not sales commissions were deducted prior to the arrival of these net profit figures for 1953 and '54? Is there anything on that exhibit that would indicate that?

A. Nothing on this exhibit that you hand me here, no.

Q. And you recall nothing from memory?

A. I would have to say on that, no.

Q. Now, Mr. Bradley, did you treat this extra 16 plus per cent, or 17 per cent, let us call it—you said it is 16 per cent plus so we will call it either 16 per cent or 17 per cent mark-up—that is, the excess price they paid at the lumber yards and to Stanton, of course that figured in this too, didn't it, in arriving at the net profit figure?

(Testimony of Louie M. Bradley.)

A. That is correct.

Q. So that you are unable to state from this exhibit whether or not these figures, the 5 per cent net profit for '52, 11 per cent net profit for '53 and 5 per cent net profit for '54, was over and above a sales commission payment for each of those years?

A. I would only be able to say that for 1952 the expenses do include commissions.

Q. Of about 3 per cent?

A. Approximately 3 per cent.

Q. For the other two years you don't know, do you?

A. I do not know.

Q. So that as far as '53 and '54 are concerned, this [1289] 11 per cent and 5 per cent may be the total gross profit exclusive of materials and actual installation and such, and irrespective of sales commissions or otherwise?

A. Well, it would be the figure reflected on the aabeta company and whatever they showed as expenses they were included.

Q. But from this exhibit you don't know exactly whether they are included or not, do you?

A. That is right.

Mr. Ackerson: Now, is the jury through with Exhibit M? I wonder if I could borrow that just a moment and I will hand it back.

(The exhibit referred to was passed to counsel.)

Q. (By Mr. Ackerson): This Exhibit M purports to be only the total amount of tile purchased

(Testimony of Louie M. Bradley.)

by aabeta company from Flintkote during the year 1952, is that right? A. That is correct.

Q. Can you tell from this exhibit or from your own memory whether or not aabeta paid the same price for these two small orders of tile that they paid for the first order of tile? Did they pay at the same rate per square foot or anything? Can you tell that, Mr. Bradley?

A. You mean the purchases from Flintkote?

Q. Yes. Were they all at the same price per square foot?

A. For the material shown here, the $\frac{1}{2}$ x 12 x 12 was all apparently purchased at 10 cents per square foot.

Q. And the $\frac{3}{4}$, 12 x 12?

A. That was at 14 cents a square foot.

Q. All of it?

A. Yes. There was just one purchase of $\frac{3}{4}$ inch.

Q. And these two other little items here on 3-22-52 and 5-9-52, do you find they were approximately the same price, or the same price?

A. Well, apparently there is a difference in cost between the slow burn acoustical tile and that which is not. Slow burn carrying a higher price, and that was at 13 cents a square foot.

Q. So you found those latter two small orders, aside from the first carload order, were for a different style and type of tile, didn't you? A. Yes.

Q. One was slow burn? A. Yes.

Q. And the other, I think, was a different size altogether, wasn't it? A. Yes, correct.

(Testimony of Louie M. Bradley.)

Mr. Ackerson: Mr. Black, what was that Exhibit L? [1291] I wonder if I may have Exhibit L?

Mr. Black: L was the profit and loss exhibit.

Mr. Ackerson: You had a previous exhibit, did you not?

Mr. Black: We had K, analysis of invoices. The jury has K.

Mr. Ackerson: I don't need that.

Q. (By Mr. Ackerson): Did you find, Mr. Bradley, that the aabeta books you examined by and large were kept according to fairly good accounting practice?

A. From the cursory examination we made of them, they apparently balanced.

Q. As good accounting practice, acceptable accounting practice? A. Yes.

Mr. Ackerson: We won't compare it with Lybrand & Ross, but it was acceptable. That is all.

Redirect Examination

By Mr. Black:

Q. I have one question, Mr. Bradley.

Mr. Black: Mr. Ackerson, do you recall where the profit and loss statements, do you recall where they are? I think they were simply offered for identification, other than the 1952 one which we offered. They were made available, along with those income tax returns.

Do you know where they are? [1292]

Mr. Ackerson: I don't, Mr. Black, and I don't have them in court. I know they were here at one

(Testimony of Louie M. Bradley.)

time. I don't know whether they were marked for identification or not.

Mr. Black: That will readily clear up this matter of commissions.

Q. (By Mr. Black): Are you able to quickly look at this book and determine——

A. I believe I would.

Q. ——for '53 and '54 commissions were included.

I now show you the ledger. I don't want to take up too much time, but if you are able to do it quickly from that, please do so.

A. I think I will be able to. Yes, I have the account, commissions paid, in front of me now.

Recross-Examination

By Mr. Ackerson:

Q. Does that show sales commissions? I assume that is what it means, does it?

A. I would presume so. However, they apparently were by pencil notation here paid to William Yeomans.

Q. Is that the type of commissions you referred to? A. Yes, this is the——

Q. Is that also true on the '52 schedule?

A. Yes. The amount shown on the '52 schedule is the amount shown on the ledger here (indicating).

Q. As being paid to William Yeomans?

A. There are apparently smaller amounts paid

(Testimony of Louie M. Bradley.)

to other individuals. The other large amounts, in excess of \$3,000.00, were paid to Yeomans.

Q. Is there any way we can identify that as to page number?

A. It comes from a Journal 13, which would be one of the original journal entries here.

Q. Let's mark that. That, other than the so-called commissions you refer to were paid to William Yeomans, do you see any other commissions that you might have considered as sales commissions in that book?

A. From looking at the account I am afraid I wouldn't be able to tell whether they were sales commissions or any other type of commissions.

Q. When you spoke of sales commissions, these payments to Yeomans in '53, commencing January 31, '53, are the principal commissions you were talking about, is that right?

A. These would be the ones that would show as commissions on the profit and loss statements.

Q. So that your net profit figures would have taken into consideration only these items paid to William Yeomans?

A. During 1952 and 1953, yes.

Q. I only see 1953 on this page.

A. 1952 is right immediately above [1294] (indicating).

Q. I see. And that is the amount of \$3,002.97, is that right?

A. The amount apparently paid to William Yeomans, from the records.

(Testimony of Louie M. Bradley.)

Q. Those were the items that you took into consideration as sales commissions, if they are sales commissions? A. As commissions.

Q. And no others? A. That is right.

Mr. Ackerson: That is all, Mr. Black.

Mr. Black: Thank you, Mr. Bradley.

(Witness excused.)

Mr. Black: The defendant rests.

Mr. Ackerson: I would like to call Mr. Lysfjord briefly.

ELMER LYSFJORD

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Ackerson:

Q. Are you more closely associated with the business operations, Mr. Lysfjord, and bookkeeping methods of your company than is Mr. Waldron, would you say? A. Yes, sir.

Q. That is part of your duties down there, isn't it? [1295] A. That is correct.

Q. You have heard the preceding witness refer to an item in 1952 of \$3,000.00 or more paid to William Yeomans.

Is that the same man that has been mentioned here as having been employed by you?

A. Yes, sir.

(Testimony of Elmer Lysfjord.)

Q. What are his duties?

A. Well, he acted as our superintendent, a function that covers the placing of men, checking of jobs and placing the—or, rather, telling the truck driver what materials were to be delivered to certain jobs, and at sometimes doing the delivery and the work himself.

Q. Did he have anything to do whatever with sales of acoustical tile jobs to general contractors?

A. No, sir.

Q. Would you say that any payments you made to him had anything to do with sales commissions then?

A. None whatsoever.

Q. And would that be true also in 1953?

A. Yes, sir.

Q. And '54? A. Yes, sir.

Q. In other words, he was always your construction superintendent?

A. That is true. [1296]

Q. Supervisor, and so on? A. Yes.

Q. He had never anything to do with sales?

A. At no time.

Q. You never paid him any sales commission of any kind, did you?

A. No, sir.

Q. Now, Mr. Lysfjord, to your knowledge—you are acquainted with this ledger, are you not (indicating)?

A. I am acquainted with it.

Q. I am referring, for the purpose of the record, and we have been referring to Plaintiffs' Exhibit 42 for identification.

Both with respect to Mr. Bradley and Mr. Lysfjord.

(Testimony of Elmer Lysfjord.)

Are you acquainted generally with this?

A. Yes, sir. [1297]

Q. Do you work with it as partner in the aabeta company?

A. I worked with it in conjunction with our accountant.

Q. But you are acquainted with the general make-up of it? A. Yes, sir.

Q. Do you know whether or not, Mr. Lysfjord—and let's assume that this Exhibit L, Defendants' Exhibit No. L, is correct mathematically—I am going to call your attention to the net profit figures on the bottom of the tabulation there. Can you state whether or not those net profit figures of 5 per cent, 11 per cent and 5 per cent were net profit, the profits for those years after deduction of sales commissions of any kind?

A. I don't believe I could answer that at all in the percentage bracket because in the operation of our company we never did break it down to a percentage relation one to the other.

Q. Can you tell us whether those figures of 5 per cent, 11 per cent and 5 per cent for the respective years included all of the profits for those years? I am not talking about the percentage, I am asking you to assume that those percentages are right. Did you or Mr. Waldron receive any additional compensation other than that by way of salesmen's commissions, for instance? [1298] A. No, sir.

Q. In other words, that was the profit you made for those three years?

(Testimony of Elmer Lysfjord.)

A. If I understand your question correctly, I am assuming that these figures are correct.

Q. I want you to assume that for purposes of answering the question.

A. Then they would have to reflect exactly what you mentioned.

Q. They would not reflect any additional sales commissions to either you or Mr. Waldron?

A. That is correct.

Q. That would be the profit you made?

A. That would be the profit.

Q. From the entire operation?

A. Yes, sir.

Q. Mr. Lysfjord, can you state whether or not or what effect—state, first, whether or not after you were terminated from The Flintkote Company's source of supply, whether or not you could or did continue to bid as you had theretofore on acoustical tile jobs.

A. No, sir, we couldn't.

Q. Can you explain why?

A. Well, the additional premium that we had to pay for our materials offset the amount of mark-up that we could get [1299] for the job to make it worth our while to do the work. You see, we don't make the prices that we could get the work for, our competition does that, and by paying this extra premium sometimes we couldn't even make a profit on the job at all, so we couldn't bid some of those that we had in the past.

15 per cent or 17 per cent is a considerable amount

(Testimony of Elmer Lysfjord.)

of money when you bring it right down to talking about 5 per cent and 11 per cent.

Q. Did you on occasion bid jobs then for little or no profit?

Mr. Black: That is objected to as leading.

The Court: Sustained.

Q. (By Mr. Ackerson): Did you as a result of being cut off from Flintkote or after your line of supply from Flintkote was no longer assured, did that fact have any other effect upon your being able to bid on acoustical tile contracts?

A. Very much so. We had no idea whatsoever, even if we did bid and were successful in getting the work, regardless of the profit angle, as to the availability of this material to us.

Q. Is it necessary that you have an assured source of supply in order to bid successfully on jobs, large jobs?

A. Absolutely. Whenever we bid, that is actually a verbal contract for us to fulfill, and if we are not able to [1300] fulfill the contract the general contractor has a right to call in anybody that he pleases to finish the job and charge us for the difference.

Mr. Ackerson: I think that is all. Mr. Black, you can cross-examine.

(Testimony of Elmer Lysfjord.)

Cross-Examination

By Mr. Black:

Q. Just one item, Mr. Lysfjord. You mentioned six or eight months ago bidding on a \$60,000 job or thereabouts on a 50 per cent mark-up, and losing that job to the successful bidder who was only \$200 or \$400 below you. That is the fact, isn't it?

A. I recall talking about it. Those exact figures I am not too sure of.

Q. You were pretty exact, weren't you, when you testified or were you merely estimating?

A. I was probably pretty exact. I told you at the time that if you were interested I would get the exact figures for you.

Q. That was a junior college job, was it?

A. I believe so.

Q. And you bid up 50 per cent over your estimated cost of that job? A. Yes.

Q. And it was a \$50,000 or \$60,000 job, or that amount [1301] of tile in it?

A. I think the whole job was that, not just the acoustical tile.

Q. You apparently had an assured source of supply when you put in that bid, didn't you?

A. I would say we did.

Mr. Black: That is all.

Mr. Ackerson: That is all.

(Witness excused.)

Mr. Ackerson: May we approach the bench, your Honor?

Mr. Black: I think that it would be wise to excuse the jury for a short period as we have some motions to make.

The Court: Members of the jury, you may go to the jury room.

Mr. Ackerson: I am going to rest except for one point, your Honor, and you can consider that I have. But after the jury has retired I will point out the remaining point.

The Court: Very well. The jurors have now all left the courtroom and the door is closed behind them.

Mr. Ackerson: We might as well get this formality out of the way first. There is what might be termed a technicality and also a substantiality, your Honor.

According to Exhibits 38 and 39, and lined up with the complaint, for whatever it is worth, it indicates that the prayer in the complaint should be amended to conform with the [1302] evidence, and I deem that this is probably the right time to do it as a procedural matter, although it is my understanding that it can be done at any time before or after. But in any event the complaint reads, after alleging that these injuries were suffered, the loss of good will, capital investment, actual and potential profit, and so forth, that it will continue, it charges that up to the date of the filing of the complaint the plaintiffs have been damaged in the sum of \$100,000.

Then the prayer is for three times that amount in the usual form.

I don't think that Mr. Black has any objection with this, and I think it should be done out of the presence of the jury, because I don't think that any claims in the complaint have any evidentiary value as far as the jury is concerned, but that figure of \$300,000 I ask be amended by interlineation or permission for a subsequent formal amendment to \$466,251 to conform to Exhibits 38 and 39. [1303]

Mr. Black: We have no objection to the amendment being made in an informal manner. But the court will recall that we have objected to the introduction of Exhibits 38 and 39 on the basis they are based entirely on speculation, and without prejudice to that position we consent that the method of amendment may be adopted.

The Court: Mr. Ackerson, will you interline the Complaint? I take it you are referring to the Amended Complaint?

Mr. Ackerson: The Amended Complaint and only in the prayer, your Honor.

The Court: Interline it so that it reads the way you wish it to read in this regard. And do it here in the presence of the clerk, who will initial it.

Mr. Ackerson: Thank you.

Mr. Black: At this time, if the Court please, we wish to renew our motion for a directed verdict in favor of the defendant on the same grounds urged and on the points and authorities submitted in support of the motion made at the conclusion of the plaintiffs' evidence, on the ground there is no

evidence connecting the defendant to a knowing participation in a conspiracy that is competent.

And in this connection, we renew our motion to strike the testimony of the plaintiff Lysfjord as to Mr. Ragland's alleged admission contained in pages 381 and 387 of the transcript. [1304]

We urge the same grounds, we rely on the same points and authorities and make merely this observation: that there is certainly nothing in the way of additional evidence produced by the plaintiffs which, in any way, supports any theory of knowing participation in a conspiracy.

We do not intend to reargue the matter, because we rely on the same authorities and the same argument heretofore made.

The Court: Believing there is sufficient evidence to create a jury question, the motion is denied. The motion to strike is also denied.

Mr. Ackerson: With that, the plaintiffs will rest, also, your Honor.

The Court: You have some further evidence, Mr. Ackerson? I thought you said that you had something that would be brief.

Mr. Ackerson: I called Mr. Lysfjord, and I think that is what I had in mind.

The Court: All right. This matter of when damages terminate, if indeed damages begin, they terminate with the filing of the complaint—I mean do they stop accruing at that time, in the absence of supplemental amended complaint?

I think that the cause of action is based on tort and that damages, if they are certain to result, even

if they have not yet accrued, would be collected under this amended complaint, provided that the case is made out. [1305]

But judges are sometimes wrong in their understanding of these things, and I suggest that the jury be instructed in the event there be a verdict in favor of the plaintiffs, that they compute the damages down to the day of the filing of the amended complaint. And then compute separately damages from that date on. So that we will have separate computations and can deal with it on motions as a matter of law later on.

Mr. Ackerson: I have no objection to that, your Honor. It certainly would eliminate the necessity for any additional trial later on, in the event of error on the part of the court or either counsel.

I have no objection to that. I think the Exhibits 38 and 39 were designed to make that possible, even though I felt at the time there was no doubt about it, I knew that the contention had been raised.

I don't suppose it would be very difficult for the jury to use plain two by two mathematics and be able to make that line of demarcation from those exhibits.

Mr. Black: I think the Court perhaps overstated our position slightly. Our position, to state it again, is that we concede, in the event of liability, we would be liable for refusing to sell or failure to supply tile up to the time of the filing of the complaint, even though that damage occurred later.

But not merely damage actually sustained up to the filing [1306] of the complaint, but damage re-

sulting from the refusals to supply tile up to that date.

If the distinction is clear, I think that is the position we take in the matter.

Mr. Ackerson: I believe I have talked with Mr. Black and Mr. Doty and that was my understanding, your Honor, that if it is shown that the effect of any acts taken prior to the filing of the complaint continued on, just as I argued before, that it could come on down to the date of the trial. If I am correct, is that what you stated, Mr. Black?

Mr. Black: Not quite that much.

Mr. Ackerson: In other words, if it arises out of an act for which your client is liable. It occurred prior to the filing of the complaint.

Mr. Black: That is right.

Mr. Ackerson: Then the damages could come on down——

Mr. Black: That is correct.

Mr. Ackerson: ——to the present time. And I think that is what your Honor has already ruled on. Maybe——

Mr. Black: No.

Mr. Ackerson: I think that was his Honor's first ruling. If that is the case, then I don't see any reason for asking for two verdicts from the jury, your Honor.

Mr. Black: There very definitely is. There very definitely is. [1307]

Mr. Ackerson: Maybe I don't understand then, Mr. Black.

Mr. Black: Well, our position is that the cases

establish, in a situation of this kind, where there is no single piece of property, such as a lease or what-not, that a refusal to sell is implied in law as a continuing refusal to sell. And that damages resulting from failure to supply tile up to the filing of the complaint is all that can be recovered in this action.

Now, that damage may have continued for some period after the filing of the complaint, but it must be based on refusals to supply tile only up to that date, on our theory.

On your theory, as I understand you, you contend that the failure to supply tile right up to the time of the trial is the basis for all damage that can be recovered in this action.

Mr. Ackerson: We can't make each other understand, Mr. Black. No. My theory is this: That there was only one refusal to supply tile. That occurred along about February 19, 1952. From that one refusal, under the evidence in this case, there was continuing damage right down to date, and into the future. His Honor has taken care of the future damage, because he has pointed out that that is a matter for injunctive relief.

But otherwise, I don't see we differ any. I don't care whether it is one refusal or continued refusals up to the [1308] date of the trial. I say it was the one refusal on February 19, 1952, that caused all the damage, that may continue indefinitely, but which, by ruling of the Court, has been stopped so far as the jury is concerned, up to the date of the trial. In fact, the damage figures, by and large,

go to estoppel a couple of months ahead of that. That is my understanding, Mr. Black.

But either of our statements, I can't see the reason for a special instruction to the jury, your Honor.

Mr. Black: We can.

Mr. Ackerson: Maybe I am not understanding. I don't believe there is a necessity for it now.

The Court: Mr. Black, you haven't submitted one, have you?

Mr. Black: What did you say?

The Court: You haven't submitted it?

Mr. Black: Yes, we submitted an instruction on that point.

The Court: That one escapes my recollection.

Mr. Black: Instruction 46.

Mr. Ackerson: Have you submitted your revised instructions, Mr. Black?

Mr. Black: Yes, we have submitted them.

Mr. Ackerson: I have some to submit to your Honor. I told you I would revise some of the instructions, that I [1309] have given you, and I have added two or three instructions. But I haven't had any chance to examine Mr. Black's latest additions.

I understood that he had agreed to withdraw these instructions we are talking about relating to——

Mr. Doty: Not that one.

Mr. Black: Not that one.

Mr. Ackerson: I see.

Mr. Doty: On the \$20,000.00——

Mr. Ackerson: I think that is a matter of your

Honor adopting one instruction as against the other.

I believe the date is there from which the jury could derive the damages. After Mr. Black's statement today and my own, I have my doubts it is necessary. I can't see that it makes a great deal of difference.

Mr. Black: We believe our difference is substantial and poles apart, Mr. Ackerson.

The Court: Do you want to submit a form of verdict to cover the particular point?

Mr. Black: I think it could be covered by instructions to find separately.

The Court: Well, if they are going to find separately they will have to state it separately in the verdict. Do you want to draw up a form of verdict?

Mr. Black: We can. [1310]

The Court: If you will I will at least have in mind how you would like to have it found. [1311]

Mr. Black: Yes, I am sure we can state that.

Now, does your Honor wish to proceed with the argument at this time or settle the matter of instructions at this time?

The Court: The settlement of instructions is always a difficult problem. It all too often bogs down into the niceties of language, and we find that instructions that are finally given are given more with an idea to appellate decision language than to helping the jury here.

There are over a hundred proposed instructions and some of them quite long. I suppose it would

take a full court session if they were all given. I am wondering if, since there isn't a great deal of conflict—each side has in some instances asked for the very same instruction—if the court cannot simply read the charging language of the amended complaint, the relevant portions of the statute involved, give the classical definition of conspiracy and the necessity of finding that this defendant was a member of the particular conspiracy, and then get into damages doing it as best I can as a condensation from these long instructions you have given, and then call upon you to state your exceptions and if I have left anything out I will try to give it.

That is what we have done generally in other cases, but this is the first antitrust case I have had to go to the jury.

Mr. Black: I think we can work out some such formula. [1312]

Mr. Ackerson: I don't see any objection to that, your Honor.

I do have, as I say, some revisions and I think one or two additional instructions on damages, which would be up to your Honor to decide whether they were necessary or whether you wished to give them, and if I think you should, of course, as your Honor says, I can object and so state at the time.

The Court: Do you have any objection to proceeding with your argument now?

Mr. Ackerson: No, I have no objection.

The Court: Let us take a short recess and then we will hear argument and if you get through early

enough we will hear Mr. Black, but I doubt if we will get to his today.

Mr. Black: I would think it would be wise to limit ourselves to some specified time, if the court please, because it is always unsatisfactory to have unlimited time in a situation of this sort.

The Court: What limitation do you suggest?

Mr. Black: I would be quite content with an hour or an hour and 15 minutes a side.

Mr. Ackerson: Well, your Honor, I had thought that I would try to finish opening and closing in somewhere around an hour and a half.

Mr. Black: That will be all right. [1313]

Mr. Ackerson: But I find I am simply unable to follow a prepared argument or memorized one and I think the case is sufficiently important so for the sake of another half hour on each side that we shouldn't do anything except try to limit ourselves on that. I don't want Mr. Black to limit his argument, either.

I would hate to have your Honor say an hour and 15 minutes or an hour and 30 minutes if two hours was deemed advisable or necessary. After all, we have taken up the court's time for over two weeks now and the jury's time and I don't think we ought to be bound now by 30 minutes or an extra hour.

So I would suggest—I think Mr. Black and I will both try and limit ourselves as to what we think is practical—after all, we are not going to talk ourselves out of the jury, if we can help it.

The Court: Well, neither of you have shown signs of being unduly prolix in argument so I think

we can leave it to your discretion, but if either of you want us to call you after a certain period of time, we will.

Mr. Block: I think it might be well to strive to keep within limits such as I have suggested because otherwise we are just apt to get out of control on a thing of this sort.

The Court: I should hope that the argument would not require more than an hour and a half for each side.

Mr. Ackerson: I doubt that it would, your Honor. I [1314] just don't like the idea, after having spent this much time, of trying to work against a deadline of 30 minutes or something like that after two or three weeks of trial. I will try very hard to keep it within an hour and a half. It may be less time than that.

The Court: Then the court will express a hope that you both succeed in containing your thoughts within the stated time though I won't impose it as an absolute rule.

Mr. Ackerson: Very well. I think you can depend on both of us to do that.

The Court: We will have a short recess.

(Short recess.)

The Court: The plaintiff will now make his opening argument. The plaintiff has two arguments to make. The first one is supposed to be the complete argument, but then the defendant makes his argument and any new matter which is injected in the defendant's argument may be replied to by the

plaintiff in his close. So this will be Mr. Ackerson's principal argument. [1315]

* * *

The Court: We will hear the defense argument tomorrow. [1367] You don't want to begin now?

Mr. Black: I much prefer not to start for 10 minutes.

The Court: You could hardly get started—

Mr. Black: Yes.

The Court: —before recess time, which is upon us.

We will convene this case tomorrow afternoon at 2:00 o'clock, instead of the usual 1:30.

(Whereupon, at 4:40 o'clock p.m., Tuesday, May 24, 1955, an adjournment was taken to Wednesday, May 25, 1955, at 2:00 o'clock p.m.) [1368]

Wednesday, May 25, 1955—2:20 P.M.

(Whereupon, the following proceedings were had in the court's chambers, outside the presence and hearing of the jury.)

The Court: Instructions?

Mr. Black: We have been stuck with a problem, your Honor, last night, until long hours and reluctantly came to the conclusion we just didn't see any way in which that could be accomplished for this reason:

That the two conflicting theories between Mr.

Ackerson and ourselves are basically different conceptions in law.

The issue just, as we see it, can't be submitted in the alternative without attempting to submit two unreconcilable theories of law to the jury.

The Court: I just about came to the same conclusion during the evening.

Mr. Ackerson: I was trying to say that yesterday. But I didn't think Mr. Black and I were far apart.

I told Mr. Black last night, when he called me, that I thought there should be a single verdict, too, your Honor.

The Court: Well, then, we will submit the single verdict, which will compensate for all damage for acts done prior to the filing of the Amended Complaint.

Mr. Ackerson: That is what I think should be done. [1370]

The Court: I suppose the jury should be instructed that if they find for the plaintiffs, that the court would then restrain the commission of further acts of the same character, so that they would appreciate that diminution in damage in the future.

Mr. Ackerson: Well, yes.

Mr. Black: That, however——

Mr. Ackerson: I think that was your Honor's ruling before. I mean there is a request for injunctive relief, and upon a proper showing the court has the power to restrain any future damage, and they don't have to consider that.

Mr. Black: That is correct. But I think an ele-

ment in that relief would be proof of the continuing conspiracy.

The Court: Yes.

Mr. Ackerson: Oh, yes, that would have to be shown.

Mr. Black: The jury doesn't have to concern themselves——

Mr. Ackerson: But they don't have to concern themselves with that.

The Court: The only way in which I think the jury is concerned with it is this: If we say, "Now, jury, you are going to assess all damages that are certain to be suffered by the plaintiffs, as a result of acts done prior to the certain date," and if the court then is going to minimize—well, that isn't going to work out, either.

We can't minimize the damages from the acts which have [1371] been done, if those acts were, in fact, tortious. All we can do is prevent, by restraint, the commission of new acts, which would give rise to new damage.

Mr. Ackerson: Therefore, you would chop it off?

The Court: We have to be careful and not instruct in fields which indicate to the jury anything from which they could gather there is——

Mr. Black: Yes.

The Court: ——a damage which they are to find.

Mr. Black: I think that is right.

Mr. Ackerson: I agree with that.

Mr. Black: I think perhaps it would be dangerous to suggest to the jury the matter of injunctive

relief, because that is solely in the court's discretion. I think it might tend to confuse them.

The Court: You would rather I didn't mention that at all?

Mr. Black: I would rather it wouldn't be mentioned.

Mr. Ackerson: It doesn't make any difference to me.

Well, I would think that you would want an instruction, Mr. Black—I am merely suggesting this—in view of injunctive relief asked, that any damage beyond the date of trial they need not consider. But I don't—whatever way you want it.

Mr. Black: Yes. [1372]

Mr. Doty: We wouldn't need to bring in the injunctive relief.

Mr. Ackerson: No, not necessarily. But I would agree——

Mr. Doty: They can't find any damages after the date of the trial period.

Mr. Ackerson: I would agree to that.

The Court: All right.

Mr. Doty: We still don't think that is the correct instruction, of course.

The Court: Well, we are going to have to be careful and not give the jury the idea the court is instructing them to find a particular way.

Mr. Doty: Yes.

Mr. Black: That is right.

Mr. Ackerson: That is right.

The Court: I want the instructions to be correct and helpful, but bland.

Mr. Black: Oh, yes.

The Court: It is awfully hard to keep these things bland and keep enough life in them to keep the jury awake.

Mr. Ackerson: It is going to be a problem. These instructions in any antitrust case, I think, are a problem.

I think both Mr. Black and I will—we have submitted all the ideas we have on the matter. I don't think there is too much conflict. [1373]

I haven't frankly scrutinized your last document carefully, Mr. Black. I think, as I understand it, it eliminates a great deal of the conflict.

Mr. Black: I haven't seen your recent set. We have a good many objections to your instructions, Mr. Ackerson.

Mr. Ackerson: I have some objections, too, but I mean it is a question that the court has to decide for itself, anyway.

The Court: So many of these instructions give language which is practically the case language, and the language of decision is often not appropriate instruction language.

Mr. Black: I think that is so.

Mr. Ackerson: I think I could agree with that, too. But I mean it is usually contemplated that—at least, I contemplate it that the judge is going to revise the language to suit the occasion. Perhaps the thought is best expressed by judicial language.

The Court: Well, I will do the best I can with it. An antitrust case is, under any circumstances, a difficult case to try for everyone—

Mr. Black: Yes.

Mr. Ackerson: Yes, it is.

The Court: —the witnesses, counsel, the judge and the reporter. [1374]

(The following proceedings were had in open court in the presence of the jury.)

The Court: We will now hear the defendants' argument and not place any time limit unless you wish me to, Mr. Black.

I will also leave it to you as to whether we take a recess and, if so, when, that is insofar as your argument is concerned. If your voice gets tired and you would like to have a recess, we will take it. Otherwise we will let your argument be had in full and then take a recess before we hear the rebuttal.

Mr. Black: Thank you, your Honor. [1375]

* * *

The Court: We will take a recess before we have the closing argument for the plaintiffs.

(Short recess taken.) [1423]

The Court: Counsel, will you please step around to the side bench?

(Whereupon the following proceedings were had in the presence but out of the hearing of the jury.)

The Court: With respect to the proposed instructions, you have proposed one, Mr. Black, that talks about the covenant not to sue.

Mr. Black: We withdrew that.

The Court: Is that withdrawn?

Mr. Black: Yes.

The Court: It says it has been shown in evidence and so on, and I can't recall that the covenant not to sue——

Mr. Black: No.

Mr. Doty: That has all been withdrawn.

Mr. Black: We withdrew that by arrangement with your Honor before the trial.

Mr. Ackerson: I think we withdrew all instructions with reference to the settlement.

Mr. Doty: Yes. There were two and they were both withdrawn.

Mr. Ackerson: There were two or four or five, weren't there?

Mr. Doty: There were two. Both were withdrawn.

The Court: There will be no need to mention that?

Mr. Ackerson: No. [1424]

Mr. Black: No.

The Court: There will be no need to mention treble damage. There were some instructions that mentioned it and the statute mentions it, but I had intended not to read that part of the statute, and I don't think the jury has any idea there is such a thing.

Mr. Ackerson: No, I don't think it is any of their business. I think we agreed any settlement has been withdrawn. I don't think that is their business, either.

The Court: In the form of verdict, do you agree

that the verdict runs to the plaintiffs jointly, in the event there be a plaintiffs' recovery? That is, one verdict.

Mr. Black: Yes.

Mr. Ackerson: Yes, there is no reason for any other.

The Court: I should have asked you about these things at the close of the argument, but I might have forgotten it and then I would have thought of it perhaps at the beginning of the giving of the charge, and I didn't want that to happen.

(Whereupon, the following proceedings were had in the presence and hearing of the [1425] jury.)

* * *

The Court: Counsel, one other thing I forgot to take up with you. Will you step over here for a moment, and the reporter? [1457]

(The following proceedings were had with court and counsel at the bench outside the hearing of the jury.)

The Court: Very often jury deliberations in cases of this type are somewhat protracted. The case has taken considerable time to try. I always hesitate to apply anything which might be deemed coercive toward the jury or which might have that effect.

I wonder if you care to stipulate that if the jury does not arrive at a verdict by the close of the regular court day tomorrow that they might separate under an appropriate admonition and return to resume their deliberations the following day?

Mr. Black: Yes.

Mr. Ackerson: Surely.

The Court: I think it is much better than locking them up and keeping them here all hours.

Mr. Ackerson: That is perfectly all right, your Honor.

Mr. Black: Certainly. [1458]

(The following proceedings were resumed in open court.)

The Court: Members of the jury, we will begin tomorrow morning at 9:00 o'clock so that the instructions can be completed and you may have the full day for deliberations. You cannot go out for lunch, you have to stay here until you decide the case. Tomorrow morning at 9:00 o'clock instead of the usual 9:30.

However, if you do not arrive at a verdict by the close of the regular court day we will not keep you into the evening hours. That is, don't cancel any of your social engagements for tomorrow evening, because we will simply have you come back the following day if you have not arrived at a verdict by the ordinary adjournment hour tomorrow.

So you are now excused until 9:00 o'clock tomorrow morning.

(Whereupon, at 5:05 o'clock p.m., an adjournment was taken until 9:00 o'clock a.m., Thursday, May 26, 1955.) [1459]

Thursday, May 26, 1955—9:00 A.M.

The Court: This has been a rather long case, members of the jury, and not the type with which you are jurors would be particularly experienced in, but generally rules of evidence and the like, which apply to one case, apply to another.

I will try to give you a good set of instructions and if, in your deliberations, you find you need some more, come back and we will undertake to clear up any matter of law that might be bothering you.

Ordinarily, if a case of this length, this involved, were tried before a judge, the judge would say, "I will take it under submission," and he would then have a lot of time on days when there are no trials and on week ends and the like to think about it, and to examine exhibits and come to a decision. I have cases that I have had under submission for almost three months, but you, as jurors, can't do that.

What is supposed to take the place of lapse of time, in letting things shake down in your mental processes, is that you will talk to each other and give the case full and fair consideration by talking it out, each juror expressing himself or herself about the facts of the case, and each juror listening to the thoughts of the other jurors, so that when you come to an agreement by verdict, the verdict will actually be a true agreement and you will all feel the [1461] way that that verdict stands.

Now, I have no idea what that verdict would be. If I were deciding this case I would have to take it **under submission**. It is not one of those that is so

obvious either way that you can simply announce a decision right off.

Most of these instructions will be read. An occasional one, such as that just given, will be oral. But it makes no difference, they are all instructions to the jury from the court and are to be followed as the law.

There are some things in law with which we deal with such frequency that a judge has the rule firmly in mind and can simply recite it from memory. There are others that are not so firmly in mind and I will have to read those to you. There are also some in which the attorneys have asked that particular language be used and, of course, I haven't undertaken to memorize them. I will simply read the language upon which there has either been agreement or been a request upheld in favor of one or the other. But they are all instructions of the court and each one is to be considered with the others. Don't single out any one and act on it alone, but treat the instructions as a whole.

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof [1462] as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible.

In a civil action such as the one which has just been tried, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring his side of the ques-

tion is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that on that issue, the probability of truth favors that party.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or [1463] facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

Any manufacturer, such as The Flintkote Company, has a right to select its own customers. It has a right generally to conduct its business in whatever way it determines.

However, the case here is one in which The Flintkote Company is accused of being a member of a conspiracy. The Flintkote Company or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever. But under the anti-trust laws it cannot do so if there has been a conspiracy.

The plaintiffs have filed a complaint against the defendant, accusing it and others of a conspiracy. I will not read the entire Complaint, but I will read what we call the charging language of the Complaint, which sets forth just what it is that is supposed to be the heart of the thing which Flintkote allegedly did and which it is claimed was wrong.

“Beginning at an exact date unknown to plaintiffs, but prior to the year 1951, and [1464] continuously thereafter up to and including the date of the filing of the Complaint herein, have conspired to restrain and have restrained trade and commerce in the interstate and foreign distribution and sale of acoustical tile in the Counties of Los Angeles and San Bernardino, State of California, by contracting, combining, and conspiring with each other and with other manufacturers of acoustical tile, in restraint of said trade and commerce, and have thereby substantially lessened, limited, and destroyed competition in said trade and commerce and have prevented plaintiffs from receiving acoustical tile with which to compete in said trade and commerce.

“Commencing at an exact date unknown to plaintiffs, but prior to the year 1951, and continuously thereafter up to and including the date of the filing of the Complaint herein, the defendants well knowing all of the facts herein alleged, have attempted to monopolize and have monopolized the trade and commerce in interstate and foreign distribution and sale of acoustical tile in the Counties of Los Angeles and San Bernardino, contrary to Section 2 of the Act of Congress commonly known as the Sherman Act. [1465]

“Said combinations, agreements, conspiracies, monopolies, and attempts to monopolize have, during all of said period of time tended to restrain and monopolize and have in fact restrained and monopolized trade and commerce in acoustical tile in interstate and foreign commerce.

“Among the objects and purposes of the illegal restraints and monopolies alleged herein were and are the following:

“a. To maintain and adhere to and perpetuate non-competitive prices and terms and conditions of purchase of acoustical tile from manufacturers by acoustical tile contractors in the Counties of Los Angeles and San Bernardino, and to protect and perpetuate the existing non-competitive price fixing and business allocation scheme and device and agreement existing among acoustical tile contractors in said areas.

“b. To eliminate all or substantially all competition in the sale and installation of acoustical tile in public and private construction works in the Coun-

ties of Los Angeles and San Bernardino and elsewhere in the State of California. [1466]

“c. To preserve and perpetuate the existing agreement and plan adhered to by acoustical tile contractors whereby the sale and installation of acoustical tile mentioned and described in paragraphs a and b above would be allocated among members of the defendant, The Association, at non-competitive exorbitant and high fixed prices and upon other fixed and non-competitive conditions of sale rather than pursuant to open and competitive bids and negotiations among all acoustical tile contractors doing business in said areas.

“d. To exclude competing acoustical tile contractors from their legal right to compete in the purchase, sale, and installation of acoustical tile, in Los Angeles and surrounding areas, with the defendant acoustical tile contractors named herein.

“e. To obtain a practical control and monopoly over the purchase, sale, and installation of acoustical tile in public and private buildings in the Counties of Los Angeles and San Bernardino in the State of California and elsewhere in said state. [1467]

“f. To obtain maximum exorbitant and non-competitive profits in the sale and installation of acoustical tile for use in public and private buildings in the Counties of Los Angeles and San Bernardino, State of California, and elsewhere in the State of California by the defendant acoustical tile contractors named herein.

“g. To deprive the public generally of the benefits of a competitive market in the expenditure of

public and private funds for schools, hospitals, offices, and other types of public and private building construction.”

Now, you have noted, as I read that, that I mentioned the defendants, but there is only one defendant here. This Complaint, upon which the case is tried and from which I have just read to you, was filed against many defendants. What has happened in the case with respect to the others is not of any concern to you. We are trying the case here today as to this one defendant.

The defendants, however, are L. D. Reeder Co. of San Diego; R. E. Howard Company; The Harold E. Shugart Company, Inc.; R. W. Downer Company; Coast Insulating Products; A. D. Hoppe, doing business under the fictitious name and style of The Sound Control Company; The Paul H. Denton Co.; Acoustics, [1468] Inc.; L. E. Reeder; R. E. Howard; G. H. Morris; Roy Downer, Jr.; Carroll Duncan; Charles L. Newport; Gustave Krause; Paul H. Denton; Acoustical Contractors Association of Southern California, Inc.; The Flintkote Company. It is charged in the Complaint that these defendants conspired, among themselves and with others, to violate the Sherman Act.

Now, a conspiracy is an unlawful agreement to accomplish an unlawful purpose, and after the making of that agreement the doing of some act or acts to further that purpose.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlaw-

ful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the exact means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before the [1469] defendants may be found to have engaged in such it must be shown that they were active in attempting to further the ends of the conspiracy.

Each party to the conspiracy must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Co-operation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. If a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or

scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from facts proved.

Where the existence of a conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance [1470] of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them.

The evidence in proof of the conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with a rational conclusion otherwise.

This brings us to the legal proposition that while any manufacturer, such as The Flintkote Company, would be privileged, acting entirely independently and as a private matter between itself and a proposed customer, to say to a person or firm, "We will not deal with you."

That if The Flintkote Company acted in concert

with any one or more of the other defendants here, and the acting in concert was in violation of the law, which I will now read to you, then the conspiracy would be made out.

The law which I said I would read to you is a portion of the Sherman Act, which is one of the very old laws of the United States. It goes back to the time when all of us were babes in arms. The pertinent portion of it reads:

“Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of [1471] trade or commerce among the several states, or with foreign nations is declared to be illegal:

* * *

“Every person who shall monopolize or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the United States”

is in violation of this law.

Now, that ends the exact reading from that portion of the statute.

In this connection the court instructs you, as a matter of law, the course and conduct of a business which involves a regular exchange and distribution of acoustical tile for manufacturing plants located without the State of California, to and into the State of California, to acoustical tile contractors is a business engaged in interstate commerce and is subject to and within the purview of the antitrust laws, including the Sherman Act, a portion of which I have just read to you.

Another portion of the Sherman Act—again reading the law itself—reads this way:

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of the United States in the district in [1472] which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained * * *”

Now I will depart from the exact language of the statute again:

“The purpose of the antitrust laws is to preserve the freedom of interstate and foreign trade and to secure unrestricted equality to engage in such trade and to protect the public against the evils incident to the destruction of competition, by striking down combinations which tend unduly to interfere with the free exercise of the right of those engaged or desiring to engage in such trade, or which may tend directly to suppress competition therein.

“You are instructed that a restraint of trade, within the meaning of the antitrust statutes means a restraint of competition. A restraint of interstate trade or commerce is unlawful if it is the result of an intent to monopolize or a monopoly or is created by reason of a contract, combination or conspiracy between two or more people or corporations. It is not necessary for a restraint to be illegal, that it should suppress all competition. A direct restraint of any part of the interstate [1473] commerce and trade is sufficient. A restraint, therefore, directly

affecting plaintiffs' ability or right to compete in the purchase, installation or sale of acoustical tile would be sufficient under the statute. Commerce is restrained if competition is hindered, obstructed, injured or prevented. An essential characteristic of a monopoly is a wrongful exclusion of competitors from the field."

You will note that the language here is "an essential characteristic."

"Monopoly is actually the concentration of business in the hands of a very few to such an extent that competition is thereby directly restrained.

"Every person is presumed to know the natural and probable results of his or its acts knowingly done, and an unlawful act implies an unlawful intent. If a defendant knowingly did acts which the law renders illegal, then, he is guilty, irrespective of whether he knew he was violating the law.

"The elimination of competition in interstate commerce by a corporation or by a combination or group of corporations, or competitors, controlling a substantial part of the acoustical tile industry, is an undue, unreasonable and illegal restraint under the Sherman Act, if those parties act in concert [1474] by conspiracy, without regard to any economic or financial reasons or advantages derived by the combination or group individually or collectively from such action.

"It is not a question as to what extent competition was affected nor is it a question how reasonable or unreasonable from an economic point of view the restraint of competition may have been. What the

law condemns is the power and exercise of such power on the part of an organized group to eliminate competition, and for that reason the law condemns and brands as illegal all attempts to eliminate competition by an organized group, such as has been hypothetically described here.”

It is for you to determine whether the evidence shows the existence of such a group or whether it fails to show that fact.

“The law condemns the exercise or the intent to exercise by any person or by combination or group of two or more persons to eliminate competition among or between acoustical tile contractors, so, as I have stated, if you find such a combination or group and the members of the same had the power to eliminate competition and acted together for that purpose, then I charge you that the [1475] combination is illegal and your verdict should be in favor of the plaintiffs as to each defendant whom you find to have knowingly participated therein.

“In deciding whether such a combination as I have described existed, you must consider all the facts and circumstances and all of the evidence of the case as a whole.

“If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, provided the evidence actually shows preponderantly

that plaintiffs were damaged by such acts and conduct.”

The evidence in this case is without conflict on one particular point that is essential in an antitrust case, because the antitrust law is a national law and not the law of the particular state in which business is transacted, and that is, that interstate commerce was involved, in that the product was manufactured in the Hawaiian Islands and thereafter marketed in the United States.

“A primary question for you to consider is whether defendant Flintkote Company was a party to [1476] an unlawful contract, combination or conspiracy in restraint of interstate commerce or to monopolize a part of such commerce. If you find that no such unlawful combination or conspiracy existed or that The Flintkote Company was not a party to any such combination or conspiracy, even if one did exist among others, you must return a verdict for the defendant and you need not consider any other questions.”

In other words, one of the primary questions here is, was there a conspiracy, and if there was, was the defendant on trial today a member of that conspiracy or was it acting independently of whatever the conspirators might have been doing?

“If you find that the defendant, The Flintkote Company, knowingly agreed with one or more of the acoustical tile contractors, named the defendants in this case, to restrict or prevent plaintiffs from competing with such acoustical tile contractors, you are instructed this would be a violation of the law

and if you find that this violation resulted in damage to the plaintiffs' business or property, your verdict should be for the plaintiffs in the amount you find they have been damaged.

“The Flintkote Company can be liable for [1477] refusing to sell acoustical tile to plaintiffs only if such refusal to sell was in furtherance of and as a consequence of a knowing participation in an unlawful combination or conspiracy.”

In other words, we come back to the old principle that if The Flintkote Company was acting entirely on its own, without conspiracy with the other defendants, then there is no cause of action.

“You may not use any admission made outside of court by members of the alleged conspiracy for purposes of determining whether The Flintkote Company was a member of an unlawful conspiracy, unless The Flintkote Company through its agents was present when the statement was made and the agent or agents so conducted himself or themselves as to signify agreement with the statements or declarations.

“If you conclude, however, from the evidence that The Flintkote Company was a member of the unlawful conspiracy, you may then consider as if made by said company any statements or declarations of other members of such conspiracy, provided such statements were made during the existence of the conspiracy and in furtherance of an object or purpose of the particular conspiracy.

“The defendant The Flintkote Company [1478]

is a corporation and as such acts only through its agents.”

We are all natural persons, you in the jury box and I here; we are natural persons. But a corporation is an artificial person. It is really a concept of law, which applies to a particular form of legal organization, and it is called throughout the law an artificial person. It can only act through actual or real persons or its agents in the type of thing which is involved in this lawsuit.

And a conspiracy cannot exist between a corporation and its own employees or agents, acting in such capacity. In other words, if the corporation is an artificial person, it has to act through its officers and employees, and insofar as they act within their capacity, as such, to accomplish the purposes of the corporation, doing it only as officers and agents of the particular corporation, they are not to be deemed as conspiring because they are attempting to carry out the purpose of the particular corporation. Accordingly, you may not base a finding of conspiracy merely upon any concert of action solely among the agents and employees of The Flintkote Company.

“You cannot find that The Flintkote Company was engaged in an unlawful transaction, combination or conspiracy solely on the basis of the fact that The Flintkote Company refused to sell or stopped selling acoustical tile products to plaintiffs. You can so [1479] find only if there is other evidence of a substantial nature which furnishes a

valid basis from which the alleged fact of such unlawful conduct may be reasonably inferred.

“Before you can conclude that a combination, agreement or concert constitutes an unlawful conspiracy or concert you must determine that its inherent tendency is to substantially lessen, hinder or suppress competition into the channels of trade or commerce or to monopolize trade or commerce with respect to the commodity here involved.

“Before plaintiffs are entitled to recover damages for violation of the antitrust laws they must prove some appreciable harm to the general public in the form of undue or unreasonable restriction of trade and commerce, as a result of a wrongful contract, combination or conspiracy or monopoly or attempt to monopolize.

“The general public’s interests have not been injured, within the meaning of the law, unless the restraint imposed brought about or was reasonably calculated to bring about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available to [1480] the channels of commerce or some substantial consequence to the free flow of that commodity in commerce if you find certain persons connected with this case acted in a similar manner, with knowledge that other persons were so acting, you are permitted to consider such conscious parallel action as some evidence that that person contracted, combined or conspired so to act. But conscious parallel business behavior is not in itself a violation of

the antitrust laws and does not necessarily show an agreement among the persons so acting. Similarity of action may be the result, not of previous agreement, but of solving a similar situation in a similar manner. The crucial question for determination in connection with conscious parallel behavior is whether it stemmed from independent decision or from agreement, either tacit or expressed.”

Now, you note that the court has directed your attention to the fact that there must be some effect upon the general public interest, which is to have free commerce and trade upon a competitive basis.

However, the public, through its attorneys, federal attorneys, may prosecute such actions in the criminal courts or take action to restrain. This is not such an action. This [1481] is an action in which these particular plaintiffs say that they were injured and, as you will recall from an earlier instruction, any person or firm which has been injured by the action in concert and conspiracy of others, acting in violation of the Sherman Act, is entitled to collect damages suffered by the persons who have been so affected.

This means, in a practical way for you, that if you find that Mr. Ackerson was right in his arguments here, and the evidence does show that there was a conspiracy, then even so you cannot undertake to punish it. Your duty is not, if you find that the plaintiffs are right, to take steps to bring about punishment or redressment of the injury which the public suffered, but instead will be to compensate the plaintiffs for the loss which they have sustained.

That means that if you find for the plaintiffs you cannot take any idea of punishment into consideration.

Some of you might have sat in cases in which a court has said if you find that a defendant did a particular act—and, of course, judges never say or shouldn't say that a defendant has or that a defendant has not done a particular act. That being a question of fact, they leave it for the decision of the jury, as to whether the acts alleged have been proved.

But if they have been proved, in certain types of cases a judge will say to the jury—and the law gives him ample [1482] basis in certain types of cases to say it—"You may add a sum of money in order to make an example of this defendant, so that others will be deterred, and in order to punish this defendant because of the wilful, wrongful nature of its acts."

This is not such a case. In your consideration of the antitrust laws you are not, even if you find a verdict in favor of the plaintiffs, to take into consideration any element of punishment, or what some people call "smart money," to make a defendant smart under the lash of law enforcement.

If you find for these plaintiffs your finding must be limited only to finding the actual damages which the plaintiffs have suffered, and, of course, you can only do that if you first find there was the particular type of conspiracy which has been described in these instructions, for that is the type which is charged. If you find there was, you must find it from the

evidence, either the circumstantial evidence or the direct evidence.

You must find, in addition to that, before you can find for plaintiffs, that the defendant on trial here, The Flintkote Company, was an actual participant in the conspiracy and was not acting independently of the conspiracy and its own interest, acting alone.

One of the attorneys wrote this out for me. I see he did it in much shorter language than I gave you when I got to simply talking about it. [1483]

“The plaintiff in an antitrust action can recover damages only for injury to his business or property, which does not include damages for embarrassment, humiliation, disappointment or other matters of a personal nature or by way of punishment.”

If the defendant has acted as has been charged here, so that the defendant would be responsible to the plaintiffs, under these instructions, the defendant would be what is called in law a tortfeasor. Tort is an old French word. It comes from the same root word as torture. It means generally that a wrong that is not a breach of contract, but a wrong of some kind.

“A tortfeasor is liable for all consequences naturally resulting, all injuries flowing from his wrongful act, whether in fact anticipated or contemplated by him when his tortious act was committed. Recoverable damages therefor include compensation for all injury to plaintiffs’ business arising from wrongful acts committed by defendant, provided such injury was the natural and proximate result of the wrongful acts.”

You notice I said "proximate result." I didn't say "approximate." Approximate means about or almost. Proximate means direct and exact. [1484]

"This includes injury to business standing or good will, loss of business, additional expenses incurred because of the tort and all other elements of injury to the business. These are governing principles applying to compensatory damages, whether damages be compensatory or exemplary. Their propriety cannot be governed or measured by any precise yardstick. They must bear some reasonable relationship to the injury inflicted and the amount must rest largely in the discretion of the trier of facts."

You should examine, if you find that this is a case for damages, the evidence which has been introduced respecting damages. Bear in mind, if you find damages, that the damages would be limited to compensation for injury to plaintiffs' business arising from the acts of the defendant, providing such injury was the natural and proximate result of the acts. This may include injury to business standing or good will, to a loss of business which would otherwise have been enjoyed by the plaintiffs, to additional expenses incurred because of the tort, and other elements of injury to the business.

I have read here that they cannot be governed or measured by any precise yardstick, meaning by that that you just can't take an adding machine and go into the jury room and add up various items which have been mentioned here, but there must be a finding that the damage actually resulted. [1485]

I had another instruction one of the counsel handed me on damages only this morning, and which I carried up to the bench with me here and have misplaced it.

Mr. Doty: Here is an extra one.

The Court: Do you have a copy? I will either use yours or Mr. Ackerson's, if you have one.

Mr. Ackerson: Yes, I have a copy of that, your Honor. I don't think either of them should be given, however.

The Court: "Plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to the time of the beginning of this trial."

There have been contradictions in the testimony of witnesses. Now, in this matter you will recall that the court has said, "He who asserts the affirmative of a matter must produce a preponderance of evidence."

The preponderance of evidence doesn't simply mean a greater number of witnesses, because one witness, who carries conviction and force in your careful analytical mind, might outweigh a number of witnesses whose approach to a problem or to the particular subject might be thought by you to be either frivolous or unconsidered or not truthful. It doesn't mean you add up the number of witnesses, but you compare the [1486] force and value of the testimony.

The person who asserts the affirmative on the case has to have a preponderance of evidence, which means there must be a little more evidence, at least a little more evidence on his side than on the other side, because if you find that it is evenly balanced, then the decision goes to the one who resists the case, not the one who is trying to establish the affirmative.

Witnesses are presumed to speak the truth. They come here to the witness stand, are sworn to tell the truth and it is presumed they will stand by their oath. In a case where one says one thing and another contradicts that, either directly or by stating facts which, as a mass of facts, would contradict it, the jury has to determine where the truth lies. In doing that you may consider the relationship of the witness to the case, what he has to gain or lose, what interest he has either personal or as an employee.

You may determine whether he was dealt with fairly by counsel or whether he was not, determine his quality of intelligence. Does he have a good memory or does he not have? Can you rely generally on his testimony? Is it such that you would be willing to rely on it in serious affairs of your own? Does he have a disposition to tell the truth or is he evasive or have a disposition to speak an untruth?

You may consider whether at other times and places he [1487] has stated things in contradiction to what he has stated here. And if that should appear to be the circumstance, consider the circumstances under which both statements were made,

the statement made here and the statement made at the other time and place.

It takes 12 of your number to agree upon a verdict. When you retire to the jury room, elect one of your number foreman and that foreman will preside over your deliberations, and he will see to it that each member of the jury gets to have his or her part in the discussion, that you all have the benefit of the views of the others.

And if you can arrive at a verdict, the foreman will reduce that verdict to writing on forms which the bailiff will hand you, and you will then return to court when that verdict is unanimous. But it must be unanimous, it must be all 12 of you.

Now, counsel, the court will hear your exceptions to the charge.

This is a duty that the law imposes upon the attorneys and upon the court. After the judge has instructed the jury, which, as you have observed, is a moderately lengthy process, and always subject to the possibility that the judge has overlooked something or has had a slip of the tongue, the attorneys may step around to the side of the bench, out of the hearing of the jury, and point out to me what they think [1488] my errors have been, and may suggest ways in which the instructions should be extended.

You may do that now.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury.)

Mr. Doty: For the record, I think we should have our 14 new on burden of proof, which said that the plaintiff has the burden of proof on all issues, and that in the event he does not sustain the burden of proof, they are to find for the defendant. I don't think that was ever stated.

The Court: There were many instructions submitted on that particular issue. I selected one and did not wish to repeat.

Mr. Doty: We believe that our instructions 46-A through 46-F should be given. It is on an entirely different theory of damages from the one stated, but, for the record, we would like to insist that they be given.

The Court: The insistence is noted and I have given them as far as I feel that I properly can.

Mr. Doty: I take it that it is sufficient if we specify 46-A through 46-F, without specifying which is new, because, obviously, we only want the latest version of those.

The Court: The court will protect you by saying that I understand the exception and I deliberately and knowingly decline to give all the instructions just mentioned. [1489]

Mr. Doty: We also had an instruction 45 new, which was an additional instruction in connection with damages based on speculation and guesswork, which we feel should be given.

The Court: I had your instruction before me, but I thought a little extemporaneous one would tell them a little better. Do you think I missed it?

Mr. Doty: I don't think you got in the speculation and guesswork aspect of the thing.

Mr. Black: I think that is sound, your Honor. You don't have to be precise, but you just can't pull a figure out of the air.

The Court: I will read it. Hand me that.

Mr. Black: One other observation. I think it is more a matter of confusion than error. In one of the old instructions there were several defendants in the case, which was given, that stated the jury can bring in a verdict against any defendant they find guilty, which is inappropriate in this action. It might tend to confuse. I think that was inadvertently given that way.

The Court: I think I was reading Judge James' instruction at the time.

Mr. Ackerson: That was one of the suggestions I had, was, your Honor, I think we talked this over in chambers before, and I think you ought to give an instruction or a little clarification about the fact, in connection with the suggestion [1490] of Mr. Black's, that the fact of settlement, which has been mentioned to the jury, for income taxes or anything else, should not be taken into consideration any wise by them. They are still to return the same verdict they would otherwise.

Mr. Black: I think that has been adequately covered.

Mr. Doty: I think that has been adequately covered.

The Court: I don't recall that settlement has been mentioned.

Mr. Ackerson: Yes.

Mr. Black: It was by you at the outset, at the beginning of the trial. We agreed you would instruct it had been made. I don't think we need to repeat that.

Mr. Ackerson: They should take no consideration of that. I think that ought to be said now. It has been mentioned to them, but they should eliminate it from their minds and proceed as if it hadn't.

Mr. Doty: There is no sense in calling it back to their minds to eliminate. We told them at the outset to eliminate it from their minds.

Mr. Ackerson: I don't care.

Mr. Black: We might as well let it alone.

Mr. Ackerson: That is all I have. I have no other suggestion. I think you gave a very brief charge, but I can't think of anything you missed. [1491]

Mr. Doty: I noted our 42 we thought should be given.

The Court: I understood that was in the series.

(Whereupon, the following proceedings were had in the presence and hearing of the jury.)

The Court: I overlooked one I had agreed with the attorneys to give.

“The damages, if any, which you may award plaintiffs are not to be based on speculation or guesswork. Damages which you may award plaintiffs are to be just and reasonable and must be based only on such relevant factual data, if any, as was placed in evidence in this case.”

The giving of this instruction is not to be taken

by you as an indication that the court believes you should give any nor is my cautionary remark to be taken as an indication that I believe you shouldn't.

I am not expressing myself. I don't know who should win this case, and, hence, anything which might indicate to you a state of mind on my part, as to who should win, would be an erroneous interpretation by you, because I haven't figured it out. That is for you to do, and I have had enough problems here to figure out the things that are within my province.

Mr. Ackerson: Your Honor, I don't believe that last instruction is confusing, but the thought just occurred to me, with all due respect, that you may not speculate without telling [1492] the jury what latitude and leeway they may have, which does not constitute speculation. I don't want the jury to have the inference they have to be able to sit down and figure the amount of damage, if they so find, down to the penny or the dollar. They can use their best judgment, based on the evidence that is in the record.

The Court: In the nature of things, if a plaintiff wins in a case of this kind it is impossible, as I told you before, for you to have the data in a case of this kind from which you could take an adding machine and add up the damages with minute exactness.

But you must find some basis in the evidence for any damage which you award, and don't just, as one of the attorneys said here at the bench, draw a figure out of a hat.

Does that satisfy you, Mr. Ackerson?

Mr. Ackerson: Yes, your Honor.

The Court: All right. Mr. Black, you can come up here if you——

Mr. Black: I am satisfied on that point.

The Court: Either of you may come up here and state privately any further amplification you think should be given.

All right. The clerk will swear the bailiff.

May I say counsel have both tried their cases very well, and with due regard for all the proprieties.

Mr. Ackerson: Does your Honor intend to have the alternates [1493] sit through the case? I don't know what your practice is. To sit through the deliberations?

The Court: In view of some decisions in the courts of California an alternate may be sent into the jury room if a juror becomes incapacitated during deliberations.

I had intended to have the alternates stand by. They may go to their homes, unless you have some objection.

Mr. Ackerson: I think it was a slip of your mind, your Honor. I wasn't suggesting anything.

The Court: Swear the bailiff.

(Whereupon, the bailiff was duly sworn by the clerk.)

The Court: Now, is there any one of the 12 who feels unable to go forward with deliberations?

(No response.)

The Court: The jury proper may retire.

The alternates will remain.

(Whereupon, the jury proper retired to deliberate.)

The Court: I have always had the impression that if the alternates were not needed by the time the jury retired, that the alternates should be discharged, and I have been discharging them and so have the other judges here.

I noticed the other day that in a state court action that an alternate was sent in to replace a juror who became ill during the deliberations.

I called the judge and he said, "Oh, we have a lot of [1494] authority in California for that. We do it all the time."

So perhaps we had better keep these jurors available and just trust that we do not have to cross the bridge which has just been alluded to.

Mr. Ackerson: I think that is a good idea.

Mr. Black: Yes, I think that is good sense.

The Court: Do you have any objection to their going home or wherever they wish to go, simply requiring them to leave with the clerk a note of where they might be phoned?

Mr. Ackerson: I think that is practical.

Mr. Black: That is a good suggestion.

The Court: Will you please leave with the clerk your telephone numbers and then you will be excused from further attendance unless called? We will let you know when the verdict comes in, so that you will not be restrained longer.

(Whereupon, at 9:50 o'clock a.m., a recess was taken until 3:45 o'clock p.m. of the same day.) [1495]

Thursday, May 26, 1955—3:45 P.M.

(Thereupon, the jury returned to the courtroom.)

The Court: In the case of Lysfjord against Flintkote, the jury has returned to the courtroom, having sent me a note at 3:30 that they have arrived at a verdict.

Mr. Foreman, do you have the verdict?

The Foreman: We have, your Honor.

The Court: Is it the unanimous verdict of all of you?

The Foreman: It is, sir.

The Court: All right. Will you read it, please?

The Foreman: Just the part down below, your Honor?

The Court: Yes.

The Foreman: "We, the jury in the above-entitled cause, find in favor of the plaintiffs, Elmer Lysfjord and Walter R. Waldron, and against the defendant, The Flintkote Company, and assess plaintiffs' damages in the amount of \$50,000.00."

The Court: Mr. Bailiff, will you bring the verdict to the clerk, and the clerk will poll the jury?

Mr. Clerk: Mr. McDaniel, is this your verdict as presented and read?

Juror McDaniel: It is.

The Clerk: Mr. Scritsmier, is this your verdict as presented and read? [1496]

Juror Scritsmier: Yes, sir.

The Clerk: Mr. Nittinger, is this your verdict as presented and read?

Juror Nittinger: It is.

The Clerk: Mr. Fitzpatrick, is this your verdict as presented and read?

Juror Fitzpatrick: Yes, sir.

The Clerk: Miss Gibbs, is this your verdict as presented and read?

Juror Gibbs: Yes, it is.

The Clerk: Mr. Sax, is this your verdict as presented and read?

Juror Sax: It is.

The Clerk: Mrs. Bird, is this your verdict as presented and read?

Juror Bird: It is.

The Clerk: Mrs. Lindgren, is this your verdict as presented and read?

Juror Lindgren: It is.

The Clerk: Mr. McClure, is this your verdict as presented and read?

Juror McClure: It is.

The Clerk: Mrs. Marfort, is this your verdict as presented and read?

Juror Marfort: Yes, it is. [1497]

The Clerk: Mrs. Strangman, is this your verdict as presented and read?

Juror Strangman: It is.

The Clerk: Mr. Osborne, is this your verdict as presented and read?

Juror Osborne: Yes.

The Court: This matter of polling the jury is the law's way of finding out for certain whether you are in unanimous agreement, so we have to do it unless there be some waiver, which is very unusual.

Thank you, members of the jury, for your careful attention to this case. It was a long trial, and it had its tedious aspects, but it was an important case, and I am sure you have given it careful consideration.

Thank you for your services. You are now excused until the clerk notifies you of another date on which to return.

(Thereupon, the jury retired from the courtroom.)

The Court: Counsel, the court is engaged, as you have noted, in the trial of another case, so I think the further matters in consideration of your case had better be brought up on a motion day.

Mr. Black: Very well, your Honor.

Mr. Ackerson: Could that be next Monday, your Honor?

The Court: Well, next Monday is a holiday.

Mr. Ackerson: Oh, I forgot about that. [1498]

The Court: Let me have the clerk get in touch with you. We will find a half-day or a day in which to take care of it at as early a date as I can arrange. Our calendar is pretty congested at the moment, but there are some uncertainties in it, and as soon as I can resolve those uncertainties, I will have him do that.

Mr. Ackerson: Very well.

The Court: Is that agreeable?

Mr. Black: Yes, it is.

Mr. Ackerson: Yes, your Honor.

The Court: Very well. [1499]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of June, A.D. 1955.

/s/ VIRGINIA K. WRIGHT,
Official Reporter;

/s/ AGNAR WAHLBERG,
Official Reporter;

/s/ MARIE G. ZELLNER,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 203, inclusive, contain the original:

Complaint;

First Amended Complaint;

Answer of the Flintkote Co., to First Amended Complaint;

Defendant's Proposed Jury Instructions;

Motion to Separate Legal and Equitable Issues for Trial;

Memo of Points & Authorities on Effect of "Covenant," etc.;

Defendant's Proposed Jury Instructions: Revisions & Withdrawals;

Defendant's Instruction 12, etc. (See Nunc Pro Tunc Order);

Substituted Jury Instruction No. 26 (See Nunc Pro Tunc Order);

Verdict;

Motion for Judgment N.O.V. and for New Trial;

Petition for Attorney's Fees and Costs;

Stipulation;

Memo of Points & Authorities Regarding Attorney's Fees, etc.;

Memo of Decision;

Memo Re: Attorney Fees;

Judgment;

Bill of Costs;

Notice of Appeal;

[Endorsed]: No. 15005. United States Court of Appeals for the Ninth Circuit. The Flintkote Company, a Corporation, Appellant, vs. Elmer Lysfjord and Walter R. Waldron, Doing Business as aabeta co., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 25, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15005

THE FLINTKOTE COMPANY,
Appellant,
vs.
ELMER LYSFJORD, et al.,
Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Pursuant to Local Rule 17, subdivision 6, appellant The Flintkote Company states that it intends to rely upon each and all of the points set forth in its "Statement of Points on Appeal" filed in the District Court of The United States, Southern District of California, Central Division, on December 20, 1955, and constituting pages 188 through 190, inclusive, of the Record on Appeal in this appeal, and appellant The Flintkote Company hereby adopts said "Statement of Points on Appeal" as its statement of points on which appellant intends to rely as required by said Rule.

McCUTCHEM, BLACK,
HARNAGEL & GREENE,
HAROLD A. BLACK,
G. RICHARD DOTY,

By /s/ G. RICHARD DOTY,
Attorneys for Appellant The
Flintkote Company.

Affidavit of service by mail attached.

[Endorsed]: Filed February 2, 1955.